UNITED STATES REPORTS

VOLUME 444

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1979

(BEGINNING OF TERM)

OCTOBER 1, 1979, THROUGH FEBRUARY 22, 1980

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

HENRY C. LIND

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, CHIEF JUSTICE.
WILLIAM J. BRENNAN, JR., ASSOCIATE JUSTICE.
POTTER STEWART, ASSOCIATE JUSTICE.
BYRON R. WHITE, ASSOCIATE JUSTICE.
THURGOOD MARSHALL, ASSOCIATE JUSTICE.
HARRY A. BLACKMUN, ASSOCIATE JUSTICE.
LEWIS F. POWELL, JR., ASSOCIATE JUSTICE.
WILLIAM H. REHNQUIST, ASSOCIATE JUSTICE.
JOHN PAUL STEVENS, ASSOCIATE JUSTICE.

RETIRED

STANLEY REED, ASSOCIATE JUSTICE.
WILLIAM O. DOUGLAS, ASSOCIATE JUSTICE.[1]

OFFICERS OF THE COURT

BENJAMIN R. CIVILETTI, ATTORNEY GENERAL.[2]
WADE H. McCREE, JR., SOLICITOR GENERAL.
MICHAEL RODAK, JR., CLERK.
HENRY C. LIND, REPORTER OF DECISIONS.
ALFRED WONG, MARSHAL.
ROGER F. JACOBS, LIBRARIAN.

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[1] Mr. Justice Douglas, who retired effective November 12, 1975 (423 U. S. VII), died on January 19, 1980. See *post*, p. VII.

[2] Attorney General Civiletti was presented to the Court on October 1, 1979 (see *post*, p. V).

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

December 19, 1975.

(For next previous allotment, see 404 U. S., p. v.)

PRESENTATION OF THE ATTORNEY GENERAL

SUPREME COURT OF THE UNITED STATES

MONDAY, OCTOBER 1, 1979

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE POWELL, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

Mr. Solicitor General McCree presented the Honorable Benjamin R. Civiletti, Attorney General of the United States.

THE CHIEF JUSTICE said:

Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded by the Clerk.

DEATH OF MR. JUSTICE DOUGLAS

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 21, 1980

Present: MR. CHIEF JUSTICE BURGER, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, MR. JUSTICE BLACKMUN, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS.

THE CHIEF JUSTICE said:

It is my sad duty to announce that our friend and colleague William O. Douglas died Saturday, January 19, 1980.

For five years, since he suffered a severe stroke on New Year's Eve of 1974, Justice Douglas' courage and determination exemplified a quality that characterized his entire life. All of us who knew him well, and thousands who had no personal acquaintance with him, shared an admiration for his brave struggle to regain health and strength.

His retirement in November 1975 came after the longest tenure in the history of this Court. When he achieved this record in October 1973, we took note from this Bench of his extraordinary career, his devotion to freedom, his concern for our environment, his involvement in countless causes relating to the improvement of the human condition.

Justice Douglas' public and judicial career spanned more than four decades of massive social, political and economic changes in our country, and upheavals in the established order all over the world. Those changes had large impact on the kinds of issues coming before this Court. His mark on this crucial period in our history is a very significant one. His judicial opinions appear in nearly one fourth of the more than 440 volumes of the United States Reports.

I last saw Justice Douglas within the hour before he returned to the hospital and at that time I could see no lessening of that firm, even fierce, determination he showed in every contest in his life. He fought to the very end as he had always done.

We mourn his passing but we will not forget the comradeship and friendship that overshadowed the inescapable differences on the vexing issues that historically confront this Court.

In due course a memorial service of the Bar will be held in this Chamber to more fully pay our respects, and those of the Supreme Court Bar, to Mr. Justice Douglas.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1979

PILON *v.* BORDENKIRCHER, WARDEN

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-6932. Decided October 9, 1979

Held: The requirement under the Due Process Clause of the Fourteenth Amendment that a criminal conviction be based upon proof of guilt beyond a reasonable doubt can be effectuated only if a federal habeas corpus court, in assessing the sufficiency of the evidence to support a state-court conviction, inquires "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U. S. 307, 319. Thus, in the instant case the District Court and the Court of Appeals which, prior to the decision in *Jackson* v. *Virginia*, *supra*, had denied habeas corpus relief to petitioner from his state-court conviction, erred in applying the "no evidence" test that was held to be constitutionally inadequate in *Jackson*, and the case will be remanded to the District Court for reconsideration in the light of *Jackson*.

Certiorari granted; 593 F. 2d 264, vacated and remanded.

PER CURIAM.

The petitioner was convicted in a Kentucky court on a charge of first-degree manslaughter, and the judgment of conviction was sustained on direct appeal. *Pilon* v. *Common-*

wealth, 544 S. W. 2d 228 (Ky. 1976). The petitioner then filed a habeas corpus petition in a Federal District Court, alleging that the Kentucky conviction was supported by evidence insufficient to afford him due process of law. The federal court denied relief. Applying the "no evidence" test of *Thompson* v. *Louisville*, 362 U. S. 199 (1960), the court concluded that "[a]lthough this was a close case on the evidence, we believe that the case was not devoid of an evidentiary basis for petitioner's conviction."* The Court of Appeals for the Sixth Circuit, also relying on the "no evidence" test, affirmed the denial of habeas corpus relief. 593 F. 2d 264.

Thereafter, this Court in *Jackson* v. *Virginia*, 443 U. S. 307 (1979), held that the *Thompson* "no evidence" test is constitutionally inadequate in a case such as this. An earlier decision had made clear that the Due Process Clause of the Fourteenth Amendment prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U. S. 358 (1970). The Court in *Jackson* held that this constitutional requirement can be effectuated only if a federal habeas corpus court, in assessing the sufficiency of the evidence to support a state-court conviction, inquires "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U. S., at 319 (emphasis omitted).

It is thus beyond dispute that the District Court and Court of Appeals applied an incorrect and inadequate constitutional test in resolving the petitioner's due process claim that his state-court conviction rested on insufficient evidence. Although it is quite possible that the evidence against the petitioner will survive a challenge under the correct constitutional standard, he is entitled to have his application for habeas corpus considered under that standard.

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*The opinion of the District Court is unreported.

1 Per Curiam

The motion for leave to proceed *in forma pauperis* and the petition for certiorari are granted, the judgment is vacated, and the case is remanded to the District Court for the Western District of Kentucky so that it may consider the petitioner's application for habeas corpus in the light of *Jackson* v. *Virginia*.

It is so ordered.

UNITED STATES ET AL. *v.* BENMAR TRANSPORT & LEASING CORP. ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1602. Decided October 15, 1979

Held: The Court of Appeals erred in vacating the Interstate Commerce Commission's 1977 order granting a contract carrier permit—even though the order was defective for failing to include a finding required by the Interstate Commerce Act—and in refusing to consider instead the Commission's subsequent orders that remedied the defect and that had been entered while the appeal from the 1977 order was still pending. All the interested parties had concurred in the Commission's decision to reopen the administrative proceedings and to hold judicial review of the 1977 order in abeyance, and the Commission's action, which occurred before the Court of Appeals was ready to hear arguments on the merits and before it received the record, did not interfere in any manner with the proceedings in the Court of Appeals. Cf. *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532.

Certiorari granted; 582 F. 2d 246, reversed.

PER CURIAM.

This case is here on certiorari to the United States Court of Appeals for the Second Circuit, which set aside an order of the Interstate Commerce Commission authorizing respondent Consolidated Truck Service, Inc., to begin contract carrier service in competition with respondent Benmar Transport & Leasing Corp. The order, issued October 5, 1977, was defective because it lacked the statutorily required finding that it was consistent " 'with the public interest and with the national transportation policy,' [§ 210] of the Interstate Commerce Act, 49 U. S. C. § 310 [now 49 U. S. C. § 10930 (a) (1976 ed., Supp. II)]." *Benmar Transport & Leasing Corp.* v. *ICC*, 582 F. 2d 246, 248 (1978).

The case was argued in the Court of Appeals on July 17, 1978, and decided August 16, 1978. In reaching its decision,

the Court of Appeals refused to consider two subsequent Commission orders that remedied the defect. The first of these orders, issued with the consent of all interested parties almost six months before oral argument in the Court of Appeals, reopened the administrative proceedings and made the finding required by 49 U. S. C. § 310. The second, issued on April 18, 1978, denied respondent Benmar's petition for administrative review of the former order. This denial became the Commission's final administrative order and had the effect of reaffirming its earlier decision to grant Consolidated's application for a contract carrier permit. Although the question briefed by the parties in the Court of Appeals was whether the order of April 18, 1978, was supported by the evidence, the Court of Appeals declined to examine the question on the ground that the only order properly before it was the defective order of October 5, 1977. It thus vacated the order and remanded the case for further proceedings.

We grant the petition of the United States and the Commission and reverse the judgment of the Court of Appeals. In *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532 (1970), this Court held that the Commission's broad powers to "reverse, change, or modify" its decisions "are plainly adequate to add to the findings or firm them up as the Commission deems desirable, absent any collision or interference with the District Court." *Id.*, at 541. (The applicable statute then provided for review of orders of the Commission by a three-judge District Court, rather than by the Court of Appeals.) Here the Commission's action did not interfere in any manner with the proceedings in the Court of Appeals, and the Commission acted before that court was ready to hear arguments on the merits and before it received the record. All parties concurred in the Commission's decision to reopen the proceedings and to hold judicial review in abeyance pending the Commission's final disposition of Benmar's petition for administrative review. The position of the

parties—both those who prevailed and those who lost before the Commission—is convincingly demonstrated by the fact that no party has filed a brief in support of the decision reached by the Court of Appeals.

As the Court said in *American Farm Lines, supra*, "[t]he concept 'of an indivisible jurisdiction which must be all in one tribunal or all in the other may fit' some statutory schemes, . . . but it does not fit this one." 397 U. S., at 541. After the abolition of the "forms of action" in the early common law, it was said that "[t]he forms of action we have buried, but they still rule us from their graves." F. Maitland, The Forms of Action at Common Law 2 (1936). Orderly rules of procedure are necessary in order that appellate review may be had of agency findings, but empty formalities devoid of either substantive or procedural benefit have no place in the normal scheme for administrative review unless Congress chooses to place them there. Here Congress has quite clearly not chosen to impose such virtually meaningless requirements as the Court of Appeals insisted upon.* The judgment of the Court

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*The dissenting opinion makes the bald statement that "[t]he ICC simply ignored the time limits established by the Court of Appeals and thereby prevented judicial review altogether. The Court of Appeals was not ready to hear argument and had not received the record solely because the ICC did not deign to comply with the scheduling orders of the court." The opinion of the Court of Appeals, *Benmar Transport & Leasing Corp.* v. *ICC*, 582 F. 2d 246 (1978), lends no support to this statement. Respondent Benmar petitioned the court to set aside the Commission's order but consented along with other interested parties to the reopening of the Commission proceedings before the record had been filed with the Court of Appeals or oral argument heard by that court. After the Commission completed these proceedings, it issued its final order of April 18, 1978—an order which was reviewable by the Court of Appeals pursuant to 28 U. S. C. §§ 2341–2349. The Court of Appeals thus was not deprived of its jurisdiction over this dispute. Rather, for no apparent reason other than to insist that the parties comply with an "empty formality," the Court of Appeals stated in its opinion that "when an agency seeks to reconsider its

of Appeals is inconsistent with the spirit which animated *American Farm Lines* v. *Black Ball Freight Service, supra,* and is therefore

Reversed.

MR. JUSTICE MARSHALL, dissenting.

The Court today summarily reverses the judgment of the United States Court of Appeals for the Second Circuit setting aside an order of the Interstate Commerce Commission which concededly lacked a statutorily required finding. The Court takes this action because of two subsequent orders which the Commission issued after the petition for review had been filed with the Court of Appeals without seeking the permission of that court or taking any of the proper procedural steps. I dissent.

Since the procedural timetable involved in this case is important to the issue presented, it is necessary to set out more fully the proceedings below. Respondent Benmar Transport & Leasing Corp. filed a petition to review the order of the ICC with the Court of Appeals on January 13, 1978. There were no petitions for reconsideration still pending at that time. Thereafter, counsel for Benmar notified the ICC that the order was patently defective because of the lack of a statutorily required finding. The ICC on its own motion reopened the administrative proceedings on January 27, 1978, and made the necessary statutory finding. The parties then filed a motion in the Court of Appeals for an extension of

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action, it should move the court to remand or to hold the case in abeyance pending reconsideration by the agency." 582 F. 2d, at 248. If such action were necessary in order to avoid genuine interference "in any manner with the proceedings in the Court of Appeals," *supra,* at 5, we would have a different case. But since we conclude that there was no such interference, the mere fact that application for reopening was not made to the Court of Appeals was not fatal when all interested parties consented to such reopening. See *American Farm Lines* v. *Black Ball Freight Service,* 397 U. S. 532 (1970).

time in which to file the record and briefs, and an extension was granted until March 8, 1978. Benmar filed an administrative petition for reconsideration and for reopening the ICC proceedings for receipt of new evidence on February 27, 1978. The reply to this petition was not filed with the ICC by respondent Consolidated Truck Service, Inc., until March 16, 1978—well after the deadline for filing the record and briefs with the Court of Appeals. Meanwhile, on March 7, 1978, the day before the record and briefs were due to be filed with the court, the ICC moved to have further judicial proceedings held in abeyance pending the Commission's disposition of Benmar's petition. Before the Court of Appeals could rule on this motion, the Clerk of that court was informed by Benmar's counsel that as an alternative to the motion to hold the action in abeyance Benmar intended to withdraw the petition for judicial review subject to reinstatement within 30 days after the disposition of the administrative petition. Benmar and the ICC attempted to draft a stipulation to that effect, but no stipulation was ever filed with the court. On April 18, 1978, the ICC denied Benmar's petition for reconsideration, thus making the January 27 order final. Benmar then filed an amended petition for judicial review, and a new schedule for filing the record and briefs had to be established by the court.

In light of this procedural history, it is astounding that the majority can assert that "the Commission's action did not interfere in any manner with the proceedings in the Court of Appeals, and the Commission acted before that court was ready to hear arguments on the merits and before it received the record." The ICC simply ignored the time limits established by the Court of Appeals and thereby prevented judicial review altogether. The Court of Appeals was not ready to hear argument and had not received the record solely because the ICC did not deign to comply with the scheduling orders of the court. The Commission did not even bother to move for

a second extension. Such actions by a litigant should not be condoned by this Court.*

The case upon which the majority relies so heavily, *American Farm Lines* v. *Black Ball Freight Service*, 397 U. S. 532 (1970), is not controlling. In that case there was a multiparty proceeding before the ICC. Some carriers filed petitions for reconsideration before the Commission, but while those petitions were pending other carriers filed for judicial review. The District Court temporarily restrained operation of the ICC's original order but did not affect the pending administrative petitions. For those parties whose petitions were pending before the Commission, there was "no final action" and the ICC retained "jurisdiction to *complete* the administrative process." *Id.*, at 541 (emphasis added). It was for this reason that "both tribunals have jurisdiction" of the matter. *Ibid.*, quoting *Wrather-Alvarez Broadcasting, Inc.* v. *FCC*, 101 U. S. App. D. C. 324, 327, 248 F. 2d 646, 649 (1957). This Court stressed, however, that the Commission "did not act inconsistently" with the court but rather had acted "in full harmony with the court's jurisdiction." 397 U. S., at 541–542.

This concurrent-jurisdiction concept is inapplicable in the present case. At the time the petition for judicial review was filed no petitions for reconsideration were pending before the ICC. The administrative proceedings were complete and the

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*In light of the conceded facts that after one extension the record and briefs were to be filed with the Court of Appeals by March 8, 1978, and that the ICC did not even render its revised final order until April 18, 1978, much less file the record and briefs, it does not require specific language in the lower court's opinion for this Court to be aware of the necessary conclusion that judicial review was delayed by the actions of the Commission. The majority's repeated assertion that there was no interference with the proceedings in the Court of Appeals simply ignores the procedural history below. The fact that Benmar consented to the ICC's actions does not change the fact that these litigants, like all other litigants, owe an obligation to the court not to delay judicial proceedings.

order was final as to all parties. In addition, as already noted, the ICC here did not act in full harmony with the jurisdiction of the Court of Appeals. Instead, the Commission through its actions simply forced the court to forgo the proper exercise of its jurisdiction until the ICC and the other litigants decided for themselves that they would file the record and briefs. The decision in *American Farm Lines* was not meant to give the Commission the power to stall judicial review. Contrary to the assertions of the majority, preventing the court from being effectively deprived of jurisdiction through the willful actions of litigants ignoring proper scheduling orders hardly constitutes "empty formalities." Since this Court today encourages the ICC to interfere with the proper exercise of jurisdiction of the Court of Appeals, I dissent.

Syllabus

TRANSAMERICA MORTGAGE ADVISORS, INC. (TAMA), ET AL. *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-1645. Argued March 20, 1979—Reargued October 2, 1979—Decided November 13, 1979

Respondent, a shareholder of petitioner Mortgage Trust of America (Trust), brought this suit in Federal District Court as a derivative action on behalf of the Trust and as a class action on behalf of the Trust's shareholders, alleging that several trustees of the Trust, its investment adviser, and two corporations affiliated with the latter, had been guilty of various frauds and breaches of fiduciary duty in violation of the Investment Advisers Act of 1940 (Act). The complaint sought injunctive relief, rescission of the investment advisers contract between the Trust and the adviser, restitution of fees and other considerations paid by the Trust, an accounting of illegal profits, and an award of damages. The District Court ruled that the Act confers no private right of action and accordingly dismissed the complaint. The Court of Appeals reversed, holding that "implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation."

Held:

1. Under § 215 of the Act, which provides that contracts whose formation or performance would violate the Act "shall be void . . . as regards the rights of" the violator, there exists a limited private remedy to void an investment advisers contract. The language of § 215 itself fairly implies a right to specific and limited relief in a federal court. When Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution. Pp. 18–19.

2. Section 206 of the Act—which makes it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud . . . [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," or to engage in specified transactions with clients without making required disclosures—does not, however, create a private cause of action

for damages. Unlike § 215, § 206 simply proscribes certain conduct and does not in terms create or alter any civil liabilities. In view of the express provisions in other sections of the Act for enforcing the duties imposed by § 206, it is not possible to infer the existence of an additional private cause of action. And the mere fact that § 206 was designed to protect investment advisers' clients does not require the implication of a private cause of action for damages on their behalf. Pp. 19–24.

575 F. 2d 237, affirmed in part, reversed in part, and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring statement, *post*, p. 25. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 25.

John M. Anderson reargued the cause for petitioners. With him on the brief on reargument were *Bruce W. Hyman, R. Barry Churton, Neil L. Shapiro, Joseph Martin, Jr.*, and *Jerome I. Braun*. With him on the briefs on the original argument were the above-named counsel and *Mary Beth Uitti*.

Eric L. Keisman reargued the cause and filed a brief for respondent.

Ralph C. Ferrara reargued the cause for the Securities and Exchange Commission as *amicus curiae* urging affirmance. With him on the brief on reargument were *Solicitor General McCree, Stephen M. Shapiro*, and *Paul Gonson*. With him on the brief on the original argument were Mr. McCree, *Deputy Solicitor General Easterbrook*, and Messrs. Shapiro and Gonson.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Investment Advisers Act of 1940, 15 U. S. C. § 80b–1 *et seq.*, was enacted to deal with abuses that Congress had

**John L. Casey, Paul J. Miller*, and *Harold C. Hirshman* filed a brief for the Investment Counsel Association of America, Inc., as *amicus curiae* urging reversal.

Anthony P. David and *John Bilyeu Oakley* filed a brief for Mary Sullivan et al. as *amici curiae* urging affirmance.

found to exist in the investment advisers industry. The question in this case is whether that Act creates a private cause of action for damages or other relief in favor of persons aggrieved by those who allegedly have violated it.

The respondent, a shareholder of petitioner Mortgage Trust of America (Trust), brought this suit in a Federal District Court as a derivative action on behalf of the Trust and as a class action on behalf of the Trust's shareholders. Named as defendants were the Trust, several individual trustees, the Trust's investment adviser, Transamerica Mortgage Advisors, Inc. (TAMA), and two corporations affiliated with TAMA, Land Capital, Inc. (Land Capital), and Transamerica Corp. (Transamerica), all of which are petitioners in this case.[1]

The respondent's complaint alleged that the petitioners in the course of advising or managing the Trust had been guilty of various frauds and breaches of fiduciary duty. The complaint set out three causes of action, each said to arise under the Investment Advisers Act of 1940.[2] The first alleged that the advisory contract between TAMA and the Trust was unlawful because TAMA and Transamerica were not registered under the Act and because the contract had provided for grossly excessive compensation. The second alleged that the petitioners breached their fiduciary duty to the Trust by causing it to purchase securities of inferior quality from Land Capital. The third alleged that the petitioners had misappropriated profitable investment opportunities for the benefit

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[1] Hereinafter "the petitioners" refers to the petitioners other than the Trust. The Trust is a real estate investment trust within the meaning of §§ 856–858 of the Internal Revenue Code of 1954, 26 U. S. C. §§ 856–858. TAMA, in addition to advising the Trust, managed its day-to-day operations. Transamerica is the sponsor of the Trust and the parent of Land Capital. Land Capital is the parent of TAMA, through a subsidiary, and sold the Trust its initial portfolio of investments. Several of the individual trustees were at the time of suit affiliated with TAMA, Transamerica, or other subsidiaries of Transamerica.

[2] Each cause of action was stated as a derivative shareholder's claim and restated as a shareholder's class claim.

of other companies affiliated with Transamerica. The complaint sought injunctive relief to restrain further performance of the advisory contract, rescission of the contract, restitution of fees and other considerations paid by the Trust, an accounting of illegal profits, and an award of damages.

The trial court ruled that the Investment Advisers Act confers no private right of action, and accordingly dismissed the complaint.[3] The Court of Appeals reversed, *Lewis* v. *Transamerica Corp.*, 575 F. 2d 237, holding that "implication of a private right of action for injunctive relief and damages under the Advisers Act in favor of appropriate plaintiffs is necessary to achieve the goals of Congress in enacting the legislation." *Id.*, at 239.[4] We granted certiorari to consider the important federal question presented. 439 U. S. 952.

The Investment Advisers Act nowhere expressly provides for a private cause of action. The only provision of the Act that authorizes any suits to enforce the duties or obligations created by it is § 209, which permits the Securities and Exchange Commission (Commission) to bring suit in a federal district court to enjoin violations of the Act or the rules promulgated under it.[5] The argument is made, however, that the

[3] The pertinent orders of the District Court are unreported.

[4] The District Court was of the view that it was without subject-matter jurisdiction of the respondent's suit. The Court of Appeals recharacterized the District Court's order dismissing the suit as properly based upon the respondent's failure to state a claim upon which relief can be granted, Fed. Rule Civ. Proc. 12 (b)(6), noting that the respondent's suit was apparently within the District Court's general federal-question jurisdiction under 28 U. S. C. § 1331. 575 F. 2d, at 239, n. 2.

The Court of Appeals in this case followed the Courts of Appeals for the Fifth and Second Circuits, which also have held that private causes of action may be maintained under the Act. See *Wilson* v. *First Houston Investment Corp.*, 566 F. 2d 1235 (CA5 1978); *Abrahamson* v. *Fleschner*, 568 F. 2d 862 (CA2 1977).

[5] Section 209, 54 Stat. 854, as amended, as set forth in 15 U. S. C. § 80b–9, provides in part as follows:

"(e) . . . Whenever it shall appear to the Commission that any person has engaged, is engaged, or is about to engage in any act or practice con-

clients of investment advisers were the intended beneficiaries of the Act and that courts should therefore imply a private cause of action in their favor. See *Cannon* v. *University of Chicago,* 441 U. S. 677, 689; *Cort* v. *Ash,* 422 U. S. 66, 78; *J. I. Case Co.* v. *Borak,* 377 U. S. 426, 432.

The question whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction. *Touche Ross & Co.* v. *Redington,* 442 U. S. 560, 568; *Cannon* v. *University of Chicago, supra,* at 688; see *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U. S. 453, 458 (*Amtrak*). While some opinions of the Court have placed considerable emphasis upon the desirability of implying private rights of action in order to provide remedies thought to effectuate the purposes of a given statute, *e. g., J. I. Case Co.* v. *Borak, supra,* what must ultimately be determined is whether Congress intended to create the private remedy

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stituting a violation of any provision of this subchapter, or of any rule, regulation, or order hereunder, or that any person has aided, abetted, counseled, commanded, induced, or procured, is aiding, abetting, counseling, commanding, inducing, or procuring, or is about to aid, abet, counsel, command, induce, or procure such a violation, it may in its discretion bring an action in the proper district court of the United States, or the proper United States court of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this subchapter or any rule, regulation, or order hereunder. Upon a showing that such person has engaged, is engaged, or is about to engage in any such act or practice, or in aiding, abetting, counseling, commanding, inducing, or procuring any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning any violation of the provisions of this subchapter, or of any rule, regulation, or order thereunder, to the Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this subchapter."

The language in § 209 (e) that authorizes the Commission to obtain an injunction against persons "aiding, abetting, . . . or procuring" violations of the Act was added to the statute in 1960. 74 Stat. 887.

asserted, as our recent decisions have made clear. *Touche Ross & Co.* v. *Redington, supra,* at 568; *Cannon* v. *University of Chicago, supra,* at 688. We accept this as the appropriate inquiry to be made in resolving the issues presented by the case before us.

Accordingly, we begin with the language of the statute itself. *Touche Ross & Co.* v. *Redington, supra,* at 568; *Cannon* v. *University of Chicago, supra,* at 689; *Santa Fe Industries, Inc.* v. *Green,* 430 U. S. 462, 472; *Piper* v. *Chris-Craft Industries, Inc.,* 430 U. S. 1, 24. It is asserted that the creation of a private right of action can fairly be inferred from the language of two sections of the Act. The first is § 206, which broadly proscribes fraudulent practices by investment advisers, making it unlawful for any investment adviser "to employ any device, scheme, or artifice to defraud . . . [or] to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," or to engage in specified transactions with clients without making required disclosures.[6] The second is § 215, which provides that contracts whose formation or performance would

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[6] Section 206, 54 Stat. 852, as amended, as set forth in 15 U. S. C. § 80b–6, reads as follows:

"§ 80b–6. Prohibited transactions by investment advisers

"It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

"(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

"(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any trans-

violate the Act "shall be void . . . as regards the rights of" the violator and knowing successors in interest.[7]

It is apparent that the two sections were intended to benefit the clients of investment advisers, and, in the case of § 215, the parties to advisory contracts as well. As we have previously recognized, § 206 establishes "federal fiduciary standards" to govern the conduct of investment advisers, *Santa Fe Industries, Inc.* v. *Green, supra,* at 471, n. 11; *Burks* v. *Lasker,* 441 U. S. 471, 481–482, n. 10; *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U. S. 180, 191–192. Indeed, the Act's legislative history leaves no doubt that Congress intended to impose enforceable fiduciary obligations. See H. R. Rep. No. 2639, 76th Cong., 3d Sess., 28 (1940); S. Rep. No. 1775, 76th

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action with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction;

"(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative."

Section 206 (4) was added to the statute in 1960. 74 Stat. 887. At that time Congress also extended the provisions of § 206 to all investment advisers, whether or not such advisers were required to register under § 203 of the Act, 15 U. S. C. § 80b–3. 74 Stat. 887.

[7] Section 215, 54 Stat. 856, as set forth in 15 U. S. C. § 80b–15, reads in part as follows:

"§ 80b–15. Validity of contracts

. . . . . .

"(b) Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision."

Cong., 3d Sess., 21 (1940); SEC, Report on Investment Trusts and Investment Companies (Investment Counsel and Investment Advisory Services), H. R. Doc. No. 477, 76th Cong., 2d Sess., 27–30 (1939). But whether Congress intended additionally that these provisions would be enforced through private litigation is a different question.

On this question the legislative history of the Act is entirely silent—a state of affairs not surprising when it is remembered that the Act concededly does not explicitly provide any private remedies whatever. See *Cannon* v. *University of Chicago*, 441 U. S., at 694. But while the absence of anything in the legislative history that indicates an intention to confer any private right of action is hardly helpful to the respondent, it does not automatically undermine his position. This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. *Ibid.* Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.

In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court. By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to avoid a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid. See *Deckert* v. *Independence Corp.*, 311 U. S. 282, 289; S. Williston, Contracts § 1525 (3d ed. 1970); J. Pomeroy, Equity Jurisprudence §§ 881 and 1092 (4th ed. 1918). And this Court has previously recognized that a com-

parable provision, § 29 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (b), confers a "right to rescind" a contract void under the criteria of the statute. *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 388. Moreover, the federal courts in general have viewed such language as implying an equitable cause of action for rescission or similar relief. *E. g., Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (ED Pa. 1946); see 3 L. Loss, Securities Regulation 1758–1759 (2d ed. 1961). Cf. *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 735.

For these reasons we conclude that when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.[8] Accordingly, we hold that the Court of Appeals was correct in ruling that the respondent may maintain an action on behalf of the Trust seeking to void the investment advisers contract.[9]

We view quite differently, however, the respondent's claims for damages and other monetary relief under § 206. Unlike § 215, § 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities. If monetary liability to a private plaintiff is to be found, it must be read into the Act. Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.

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[8] One possibility, of course, is that Congress intended that claims under § 215 would be raised only in state court. But we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts.

[9] Jurisdiction of such suits would exist under § 214, 15 U. S. C. § 80b–14, which, though referring in terms only to "suits in equity to enjoin any violation," would equally sustain actions where simple declaratory relief or rescission is sought.

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills* v. *United States*, 278 U. S. 282, 289. See *Amtrak*, 414 U. S., at 458; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 419; *T. I. M. E., Inc.* v. *United States*, 359 U. S. 464, 471. Congress expressly provided both judicial and administrative means for enforcing compliance with § 206. First, under § 217, 15 U. S. C. § 80b–17, willful violations of the Act are criminal offenses, punishable by fine or imprisonment, or both. Second, § 209 authorizes the Commission to bring civil actions in federal courts to enjoin compliance with the Act, including, of course, § 206. Third, the Commission is authorized by § 203 to impose various administrative sanctions on persons who violate the Act, including § 206. In view of these express provisions for enforcing the duties imposed by § 206, it is highly improbable that "Congress absentmindedly forgot to mention an intended private action." *Cannon* v. *University of Chicago*, *supra*, at 742 (POWELL, J., dissenting).

Even settled rules of statutory construction could yield, of course, to persuasive evidence of a contrary legislative intent. *Securities Investor Protection Corp.* v. *Barbour*, *supra*, at 419; *Amtrak*, *supra*, at 458. But what evidence of intent exists in this case, circumstantial though it be, weighs against the implication of a private right of action for a monetary award in a case such as this. Under each of the securities laws that preceded the Act here in question, and under the Investment Company Act of 1940 which was enacted as companion legislation, Congress expressly authorized private suits for damages in prescribed circumstances.[10] For example, Con-

[10] See Securities Act of 1933, §§ 11 and 12, 15 U. S. C. §§ 77k and 77*l*; Securities Exchange Act of 1934, §§ 9 (e), 16 (b), and 18, 15 U. S. C. §§ 78i (e), 78p (b), and 78r; Public Utility Holding Company Act of 1935, §§ 16 (a) and 17 (b), 15 U. S. C. §§ 79p (a) and 79q (b); Trust

gress provided an express damages remedy for misrepresentations contained in an underwriter's registration statement in § 11 (a) of the Securities Act of 1933, and for certain materially misleading statements in § 18 (a) of the Securities Exchange Act of 1934. "Obviously, then, when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly." *Touche Ross & Co.* v. *Redington*, 442 U. S., at 572; *Blue Chip Stamps* v. *Manor Drug Stores*, *supra*, at 734; see *Amtrak*, *supra*, at 458; *T. I. M. E., Inc.* v. *United States*, *supra*, at 471. The fact that it enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor. See *Abrahamson* v. *Fleschner*, 568 F. 2d 862, 883 (CA2 1977) (Gurfein, J., concurring and dissenting).

The omission of any such potential remedy from the Act's substantive provisions was paralleled in the jurisdictional section, § 214.[11] Early drafts of the bill had simply incorporated

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Indenture Act of 1939, § 323 (a), 15 U. S. C. § 77www (a); Investment Company Act of 1940, § 30 (f), 15 U. S. C. § 80a-29 (f).

[11] Section 214, 54 Stat. 856, as set forth in 15 U. S. C. § 80b-14, provides:

"§ 80b-14. Jurisdiction of offenses and suits

"The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this subchapter or the rules, regulations, or orders thereunder, and, concurrently with State and Territorial courts, of all suits in equity to enjoin any violation of this subchapter or the rules, regulations, or orders thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enjoin any violation of this subchapter or rules, regulations, or orders thereunder, may be brought in any such district or in the district wherein the defendant is an inhabitant or transacts business, and process in such cases may be served in any district of which the defendant is an inhabitant or transacts business or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291 and 1292 of title 28, and section 7, as amended, of the Act

by reference a provision of the Public Utility Holding Company Act of 1935, which gave the federal courts jurisdiction "of all suits in equity and *actions at law* brought to enforce any *liability* or duty created by" the statute (emphasis added). See S. 3580, 76th Cong., 3d Sess., §§ 40 (a), 203 (introduced by Sen. Wagner, Mar. 14, 1940); H. R. 8935, 76th Cong., 3d Sess., §§ 40 (a), 203 (introduced by Rep. Lea, Mar. 14, 1940). After hearings on the bill in the Senate, representatives of the investment advisers industry and the staff of the Commission met to discuss the bill, and certain changes were made. The language that was enacted as § 214 first appeared in this compromise version of the bill. See Confidential Committee Print, S. 3580, 76th Cong., 3d Sess., § 213 (1940). That version, and the version finally enacted into law, S. 4108, 76th Cong., 3d Sess., § 214 (1940), both omitted any references to "actions at law" or to "liability." [12] The unexplained deletion of a single phrase from a jurisdictional provision is, of course, not determinative of whether a private remedy exists. But it is one more piece of evidence that Congress did not intend to authorize a cause of action for anything beyond limited equitable relief.[13]

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entitled 'An Act to establish a court of appeals for the District of Columbia', approved February 9, 1893. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against the Commission in any court."

[12] The respondent argues that the omission of any reference in § 214 to "actions at law" is without relevance because jurisdiction over such cases as this would often exist under 28 U. S. C. § 1331, the general federal-question jurisdiction statute, and because there was no express statement that the omission was intended to preclude private remedies. But the respondent concedes that the language of § 214 was probably narrowed in view of the absence from the Investment Advisers Act of any express provision for a private cause of action for damages. We agree, but find the omission inconsistent more generally with an intent on the part of Congress to make such a remedy available.

[13] Congress amended the Investment Company Act in 1970 to create a narrowly circumscribed right of action for damages against investment

Relying on the factors identified in *Cort* v. *Ash*, 422 U. S. 66, the respondent and the Commission, as *amicus curiae*, argue that our inquiry in this case cannot stop with the intent of Congress, but must consider the utility of a private remedy, and the fact that it may be one not traditionally relegated to state law. We rejected the same contentions last Term in *Touche Ross & Co.* v. *Redington*, where it was argued that these factors standing alone justified the implication of a private right of action under § 17 (a) of the Securities Exchange Act of 1934. We said in that case:

> "It is true that in *Cort* v. *Ash*, the Court set forth four factors that it considered 'relevant' in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause

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advisers to registered investment companies. Act of Dec. 14, 1970, § 20, 84 Stat. 1428, 15 U. S. C. § 80a–35 (b). While subsequent legislation can disclose little or nothing of the intent of Congress in enacting earlier laws, see *SEC* v. *Capital Gains Research Bureau, Inc*, 375 U. S. 180, 199–200, the 1970 amendments to the companion Act are another clear indication that Congress knew how to confer a private right of action when it wished to do so.

In 1975, the Commission submitted a proposal to Congress that would have amended § 214 to extend jurisdiction, without regard to the amount in controversy, to "actions at law" under the Act. See S. 2849, 94th Cong., 2d Sess., § 6 (1976). The Commission was of the view that the amendment also would confirm the existence of a private right of action to enforce the Act's substantive provisions. See Hearings on S. 2849 before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess., 17 (1976); Hearings on H. R. 12981 and H. R. 13737 before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., 36–37 (1976). The Senate Committee reported favorably on the provision as proposed by the Commission, but the bill did not come to a vote in either House.

of action. Indeed, the first three factors discussed in *Cort*—the language and focus of the statute, its legislative history, and its purpose, see 422 U. S., at 78—are ones traditionally relied upon in determining legislative intent." 442 U. S., at 575–576.

The statute in *Touche Ross* by its terms neither granted private rights to the members of any identifiable class, nor proscribed any conduct as unlawful. *Touche Ross & Co.* v. *Redington*, 442 U. S., at 576. In those circumstances it was evident to the Court that no private remedy was available. Section 206 of the Act here involved concededly was intended to protect the victims of the fraudulent practices it prohibited. But the mere fact that the statute was designed to protect advisers' clients does not require the implication of a private cause of action for damages on their behalf. *Touche Ross & Co.* v. *Redington*, *supra*, at 578; *Cannon* v. *University of Chicago*, 441 U. S., at 690–693; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S., at 421. The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative, our inquiry is at an end.

For the reasons stated in this opinion, we hold that there exists a limited private remedy under the Investment Advisers Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable.[14] Accordingly, the judgment of the Court of Appeals is affirmed in part and reversed in part, and the

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[14] Where rescission is awarded, the rescinding party may of course have restitution of the consideration given under the contract, less any value conferred by the other party. See 5 A. Corbin, Contracts § 1114 (1964). Restitution would not, however, include compensation for any diminution in the value of the rescinding party's investment alleged to have resulted from the adviser's action or inaction. Such relief could provide by indirection the equivalent of a private damages remedy that we have concluded Congress did not confer.

case is remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring.

I join the Court's opinion, which I view as compatible with my dissent in *Cannon* v. *University of Chicago*, 441 U. S. 677, 730 (1979). *Ante*, at 19–21.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS join, dissenting.

The Court today holds that private rights of action under the Investment Advisers Act of 1940 (Act) are limited to actions for rescission of investment advisers contracts. In reaching this decision, the Court departs from established principles governing the implication of private rights of action by confusing the inquiry into the existence of a right of action with the question of available relief. By holding that damages are unavailable to victims of violations of the Act, the Court rejects the conclusion of every United States Court of Appeals that has considered the question. *Abrahamson* v. *Fleschner*, 568 F. 2d 862 (CA2 1977); *Wilson* v. *First Houston Investment Corp.*, 566 F. 2d 1235 (CA5 1978); *Lewis* v. *Transamerica Corp.*, 575 F. 2d 237 (CA9 1978). The Court's decision cannot be reconciled with our decisions recognizing implied private actions for damages under securities laws with substantially the same language as the Act.[1] By resurrecting

[1] The provisions of § 206 of the Investment Advisers Act of 1940, 15 U. S. C. § 80b–6, are substantially similar to § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and Rule 10b–5, 17 CFR § 240.10b–5 (1979), both of which have been held to create private rights of action for which damages may be recovered. *Superintendent of Insurance* v. *Bankers Life & Cas. Co.*, 404 U. S. 6, 13, n. 9 (1971); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 730 (1975). The provisions of § 215 (b) of the Act, 15 U. S. C. § 80b–15 (b), are substantially similar

distinctions between legal and equitable relief, the Court reaches a result that, as all parties to this litigation agree, can only be considered anomalous.

I

This Court has long recognized that private rights of action do not require express statutory authorization. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33 (1916); *Tunstall* v. *Locomotive Firemen & Enginemen*, 323 U. S. 210 (1944).[2] The preferred approach for determining whether a private right of action should be implied from a federal statute was outlined in *Cort* v. *Ash*, 422 U. S. 66, 78 (1975). See *Cannon* v. *University of Chicago*, 441 U. S 677 (1979). Four factors were thought relevant;[3] and although subsequent

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to other provisions in the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (b).

[2] *Rigsby* marked the first time this Court implied a private right of action. There the Court recognized that implied rights of action were not novel and had been a not infrequent feature of the common law. 241 U. S., at 39–40 (citing *Couch* v. *Steel*, 3 El. & Bl. 402, 411, 118 Eng. Rep. 1193, 1196 (Q. B. 1854)). See *Cannon* v. *University of Chicago*, 441 U. S. 677, 689, n. 10 (1979).

[3] "First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39 (1916) (emphasis supplied)—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? See, *e. g.*, *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458, 460 (1974) (*Amtrak*). Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? See, *e. g.*, *Amtrak*, *supra*; *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 423 (1975); *Calhoon* v. *Harvey*, 379 U. S. 134 (1964). And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law? See *Wheeldin* v. *Wheeler*, 373 U. S. 647, 652 (1963); cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 434 (1964); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388, 394–395

decisions have indicated that the implication of a private right of action "is limited solely to determining whether Congress intended to create the private right of action," *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 568 (1979), these four factors are "the criteria through which this intent could be discerned." *Davis* v. *Passman*, 442 U. S. 228, 241 (1979). Proper application of the factors outlined in *Cort* clearly indicates that § 206 of the Act, 15 U. S. C. § 80b–6, creates a private right of action.

II

In determining whether respondent can assert a private right of action under the Act, "the threshold question under *Cort* is whether the statute was enacted for the benefit of a special class of which the plaintiff is a member." *Cannon* v. *University of Chicago*, *supra*, at 689. The instant action was brought by respondent as both a derivative action on behalf of Mortgage Trust of America and a class action on behalf of Mortgage Trust's shareholders. Respondent alleged that Mortgage Trust had retained Transamerica Mortgage Advisors, Inc. (TAMA), as its investment adviser and that violations of the Act by TAMA had injured the client corporation. Thus the question under *Cort* is whether the Act was enacted for the special benefit of clients of investment advisers.

The Court concedes that the language and legislative history of § 206 leave no doubt that it was "intended to benefit the clients of investment advisers," *ante*, at 17, as we have previously recognized. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180, 191–192 (1963); *Santa Fe Industries, Inc.* v. *Green*, 430 U. S. 462, 471, n. 11 (1977).[4] Because

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(1971); *id.*, at 400 (Harlan, J., concurring in judgment)." 422 U. S., at 78.

[4] The statutory language clearly indicates that the intended beneficiaries of the Act are the clients of investment advisers. Section 206 makes it unlawful for any investment adviser "(1) to employ any device, scheme, or artifice to defraud any client or prospective client; (2) to engage in

respondent's claims were brought on behalf of a member of the class the Act was designed to benefit, *i. e.*, the clients of investment advisers, the first prong of the *Cort* test is satisfied in this case.

III

The second inquiry under the *Cort* approach is whether there is evidence of an express or implicit legislative intent to negate the claimed private rights of action. As the Court noted in *Cannon:*

> "[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question. Therefore, in situations such as the present one 'in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling' *Cort*, 422 U. S., at 82 (emphasis in original)." 441 U. S., at 694.

I find no such intent to foreclose private actions. Indeed, the statutory language evinces an intent to create such actions.[5] In § 215 (b) of the Act Congress provided that con-

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any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client"; and (3) to engage in certain transactions with "a client" or "for the account of such client," without making certain written disclosures "to such client" and "obtaining the consent of the client to such transaction." Statements in the House and Senate Committee Reports that accompanied the original legislation reinforce the conclusion that the Act was designed to protect investors against fraudulent practices by investment advisers. See, *e. g.*, H. R. Rep. No. 2639, 76th Cong., 3d Sess., 28 (1940); S. Rep. No. 1775, 76th Cong., 3d Sess., 21 (1940).

[5] Also, as the Court recognizes, the legislative history of the Act is "entirely silent" on the question of private rights of action; it neither explicitly nor implicitly indicates that Congress intended to deny private damages actions to clients victimized by their investment advisers. Every court that has considered the question has come to this conclusion.

tracts made in violation of any provision of the Act "shall be void." As the Court recognizes, such a provision clearly contemplates the existence of private rights under the Act. Similar provisions in the Investment Company Act of 1940, 15 U. S. C. § 80a–46 (b), the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (b), and the Public Utility Holding Company Act of 1935, 15 U. S. C. § 79z (b), have been recognized as reflecting an intent to create private rights of action to redress violations of substantive provisions of those Acts. *Brown* v. *Bullock*, 194 F. Supp. 207, 225–228 (SDNY), aff'd, 294 F. 2d 415 (CA2 1961); *Kardon* v. *National Gypsum Co.*, 69 F. Supp. 512, 514 (ED Pa. 1946); *Fischman* v. *Raytheon Mfg. Co.*, 188 F. 2d 783, 787, n. 4 (CA2 1951); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U. S. 723, 735 (1975); *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 426–427 (CA2 1944).

The Court's conclusion that § 215, but not § 206, creates an implied private right of action ignores the relationship of § 215 to the substantive provisions of the Act contained in § 206. Like the jurisdictional provisions of a statute, § 215 "creates no cause of action of its own force and effect; it imposes no liabilities." *Touche Ross & Co.* v. *Redington*, *supra*, at 577. Section 215 merely specifies one consequence of a violation of the substantive prohibitions of § 206. The practical necessity of a private action to enforce this particular consequence of a § 206 violation suggests that Congress contemplated the use of private actions to redress violations of § 206. It also indicates that Congress did not intend the powers given to the SEC to be the exclusive means for enforcement of the Act.[6]

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[6] The Court concludes that because the Act expressly provides for SEC enforcement proceedings, Congress must not have intended to create private rights of action. This application of the oft-criticized maxim *expressio unius est exclusio alterius* ignores our rejection of it in *Cort* v. *Ash*, 422 U. S., at 82–83, n. 14, in the absence of specific support in the legislative history for the proposition that express statutory remedies are to be exclusive. Moreover, the Court ignores the fact that the enforcement powers given the SEC under the Act are virtually identical to those

The Court's holding that private litigants are restricted to actions for contract rescission confuses the question whether a cause of action exists with the question of the nature of relief available in such an action. Last Term in *Davis* v. *Passman*, 442 U. S., at 239, we recognized that "the question of whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." Once it is recognized that a statute creates an implied right of action, courts have wide discretion in fashioning available relief. *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 239 (1969) ("The existence of a statutory right implies the existence of all necessary and appropriate remedies"). As the Court stated in *Bell* v. *Hood*, 327 U. S. 678, 684 (1946), "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." Thus, in the absence of any contrary indication by Congress, courts may provide private litigants exercising implied rights of action whatever relief is consistent with the congressional purpose. *J. I. Case Co.* v. *Borak*, 377 U. S. 426 (1964); *Securities Investor Protection Corp.* v. *Barbour*, 421 U. S. 412, 424 (1975); cf. *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S., at 39. The very decisions cited by the Court to support implication of an equitable right of action from contract voidance provisions of a statute, indicate that the relief available in such an action need not be restricted to equitable relief. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 287–288 (1940); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375, 388 (1970) ("Monetary relief will, of course, also be a possibility"); *Kardon* v. *National Gypsum Co.*, *supra*, at 514 ("[S]uch suits would include not only actions for rescission but also for money damages"). As the Court recognized in *Porter* v. *Warner Holding Co.*, 328 U. S.

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embodied in other securities Acts under which implied rights of action have been recognized. *Abrahamson* v. *Fleschner*, 568 F. 2d 862, 874, n. 19 (CA2 1977).

395, 399 (1946), "where, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." Thus, if a private right of action exists under the Act, the relief available to private litigants may include an award of damages.

The Court concludes that the omission of the words "actions at law" from the jurisdictional provisions of § 214 of the Act and the failure of the Act to authorize expressly any private actions for damages reflect congressional intent to deny private actions for damages. Section 214 provides that federal district courts "shall have jurisdiction of violations of [the Act]" and "of all suits in equity to enjoin any violation of" the Act. 15 U. S. C. § 80b–14. Although other federal securities Acts have provisions expressly granting federal-court jurisdiction over "actions at law," the significance of this omission is Delphic at best. While a previous draft of the bill that became the Act incorporated by reference the jurisdictional provisions of the Investment Company Act and the Public Utility Holding Company Act, there is no indication in the legislative history as to why this draft was replaced with the language that became § 214.[7] The only reference to the jurisdictional provisions of the Act is the statement in the House Committee Report that §§ 208–221 "contain provisions comparable to those in [the Investment Company Act]." H. R. Rep. No. 2639, 76th Cong., 3d Sess., 30 (1940). As the Second Circuit concluded in *Abrahamson* v. *Fleschner*, 568 F. 2d, at 875: "There is not a shred of evidence in the

[7] Petitioners' suggestion that this change may have been the product of industry pressure is at odds with the legislative history. Industry objections to the original draft of the legislation focused on matters unrelated to the jurisdictional provisions of the bill. See, *e. g.*, Hearings on H. R. 10065 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 76th Cong., 3d Sess., 92 (1940).

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legislative history of the Advisers Act to support the assertion that Congress intentionally omitted the reference to 'actions at law' in order to preclude private actions by investors." See *Wilson* v. *First Houston Investment Corp.*, 566 F. 2d, at 1242. The Court recognizes that the more plausible explanation for the failure of § 214 expressly to include a reference to actions at law is that, unlike other federal securities Acts, the Act did not include other provisions expressly authorizing private civil actions for damages. See *Abrahamson* v. *Fleschner*, *supra*, at 874; *Bolger* v. *Laventhol, Krekstein, Horwath & Horwath*, 381 F. Supp. 260, 264–265 (SDNY 1974). But, as our cases indicate, this silence of the Act is not an automatic bar to private actions.[8]

The fundamental problem with the Court's focus on § 214 is that it attempts to discern congressional intent to deny a private cause of action from a jurisdictional, rather than a substantive, provision of the Act. Because § 214 is only a jurisdictional provision, "[i]t creates no cause of action of its own force and effect; it imposes no liabilities." *Touche Ross & Co.* v. *Redington*, 442 U. S., at 577. Since the source of implied rights of action must be found "in the substantive provisions of [the Act] which they seek to enforce, not in the jurisdictional provision," *ibid.*, § 214's failure to refer to "actions at law" does not indicate that private actions for damages are unavailable under the Act. The subject-matter jurisdiction of the federal courts over respondent's action is unquestioned,

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[8] Congressional failure to make express provision for private actions for damages is not surprising in light of Congress' traditional reliance on the courts to determine whether private rights of action should be implied and to award appropriate relief. See *Cannon* v. *University of Chicago*, 441 U. S., at 718 (REHNQUIST, J., concurring). Although recent decisions of the Court have contained admonitions for Congress to legislate with greater specificity in the future, *ibid.* (REHNQUIST, J., concurring) and *id.*, at 749 (POWELL, J., dissenting); *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 579 (1979), Congress cannot be faulted for failing to anticipate these admonitions when the Act was enacted in 1940.

regardless of how § 214 is interpreted, because jurisdiction is provided by the "arising under" clause of 28 U. S. C. § 1331. Cf. *Abrahamson* v. *Fleschner, supra,* at 880, n. 5 (Gurfein, J., concurring and dissenting). Where federal courts have jurisdiction over actions to redress violations of federal statutory rights, relief cannot be denied simply because Congress did not expressly provide for independent jurisdiction under the statute creating the federal rights.[9]

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[9] If Congress provided no indication of any intent to deny private rights of action when § 214 was enacted, the subsequent failure of Congress to amend § 214 likewise offers none. The 1960 amendments to the Act expanded the scope of § 206 and strengthened the authority of the SEC. 74 Stat. 887. These amendments were not addressed to the private-right-of-action question, nor is there any indication that Congress considered the question when the amendments were passed. Moreover, as the Court has noted in reviewing the legislative history of the Act on a prior occasion: "[T]he intent of Congress must be culled from the events surrounding the passage of the 1940 legislation. '[O]pinions attributed to a Congress twenty years after the event cannot be considered evidence of the intent of the Congress of 1940.'" *SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U. S. 180, 199–200 (1963).

This admonition applies with equal force with respect to the 1970 amendments to the Act. Although the 1970 amendments were part of legislation that created a new private right of action under the Investment Company Act, "it would be odd to infer from Congress' actions concerning the newly created provisions of [a companion Act] any intention regarding the enforcement of a long-existing statute." *Cort* v. *Ash,* 422 U. S., at 83, n. 14. Moreover, the Committee Reports accompanying the 1970 amendments clearly indicated that the provision of express rights of action was not intended to affect the availability of implied rights of action elsewhere. H. R. Rep. No. 91–1382, p. 38 (1970); S. Rep. No. 91–184, p. 16 (1969).

The failure of Congress during its 1976 and 1977 sessions to adopt an SEC proposal to add the words "actions at law" to § 214 of the Act also does not foreclose private enforcement. The proposal, which was favorably reported on by a Senate Committee, S. Rep. No. 94–910 (1976), was intended only to confirm the existence of an implied right of action and not to create one. 575 F. 2d 237, 238, n. 1 (CA9 1978). The failure of Congress to enact legislation is not always a reliable guide to legislative

IV

The third portion of the *Cort* standard requires consideration of the compatibility of a private right of action with the legislative scheme.[10] While a private remedy will not be implied to the frustration of the legislative purpose, "when that remedy is necessary or at least helpful to the accomplishment of the statutory purpose, the Court is decidedly receptive to its implication under the statute." *Cannon* v. *University of Chicago*, 441 U. S., at 703.

The purposes of the Act have been reviewed extensively by the Court in *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U. S. 180 (1963). A meticulous review of the legislative history convinced the Court that the purpose of the Act was "to prevent fraudulent practices by investment advisers." *Id.*, at 195. The Court concluded that "Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds,' not technically and restrictively, but flexibly to effectuate its remedial purposes." *Ibid.* (footnote omitted).

Implication of a private right of action for damages unquestionably would be not only consistent with the legislative goal of preventing fraudulent practices by investment advisers, but also essential to its achievement. While the Act empowers the SEC to take action to seek equitable relief to prevent offending investment advisers from engaging in future viola-

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intent, *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 382, n. 11 (1969); *Fogarty* v. *United States*, 340 U. S. 8, 13–14 (1950). It is a totally inadequate guide when, as here, Congress may have deemed the proposed legislation unnecessary, given the adequacy of existing legislation to support an implied right of action.

[10] The Court ignores the third and fourth prongs of the *Cort* test on the ground that they were ignored in *Touche Ross & Co.* v. *Redington*, *supra*. However, in *Touche Ross* the Court found it unnecessary to consider these factors only because the other portions of the *Cort* standard could not be satisfied. By contrast, the Court here concludes that at least the first part of the *Cort* test is satisfied.

tions,[11] in the absence of a private right of action for damages, victimized clients have little hope of obtaining redress for their injuries. Like the statute in *Cannon*, the Act does not assure that the members of the class it benefits are able "to activate and participate in the administrative process contemplated by the statute." *Cannon* v. *University of Chicago*, *supra*, at 707, n. 41. Moreover, the SEC candidly admits that, given the tremendous growth of the investment advisory industry, the magnitude of the enforcement problem exceeds the Commission's limited examination and enforcement capabilities.[12] The Commission maintains that private litigation therefore is a necessary supplement to SEC enforcement activity. Under the circumstances of this case, this position seems unassailable. Cf. *J. I. Case Co.* v. *Borak*, 377 U. S., at 432; *Cannon* v. *University of Chicago*, *supra*, at 706–708.

V

The final consideration under the *Cort* analysis is whether the subject matter of the cause of action has been so traditionally relegated to state law as to make it inappropriate to infer a federal cause of action. Regulation of the activities of investment advisers has not been a traditional state concern. During the Senate hearings preceding enactment of the Act,

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[11] See, *e. g.*, § 209 (e) of the Act, 15 U. S. C. § 80b–9 (e) (authorizing the SEC to seek injunctive relief against violations of the Act); § 203 (e), 15 U. S. C. § 80b–3 (e) (empowering the SEC to revoke the registration of investment advisers).

[12] As of December 31, 1978, a total of 5,385 investment advisers were registered with the SEC. The Commission estimates that for the fiscal year ending October 30, 1980, more than $200 billion in assets will be under advisement by registered investment advisers. Brief for SEC as *Amicus Curiae* 32–33. In 1977, the SEC was able to conduct only 459 inspections of investment advisers. 43 SEC Ann. Rep. 234 (1977). As the Court recognized in *Cannon*, in many cases the enforcement agency may be unable to investigate meritorious private complaints, and even when the few investigations do uncover violations, the private victims of the violations need not be included in the relief. 441 U. S., at 706–708, n. 41.

Congress was informed that only six States had enacted legislation to regulate investment advisers. Hearings on S. 3580 before a Subcommittee of the Senate Committee on Banking and Currency, 76th Cong., 3d Sess., 996–1017 (1940). Most of the state statutes subsequently enacted have been patterned after the federal legislation. See Note, Private Causes of Action Under Section 206 of the Investment Advisers Act, 74 Mich. L. Rev. 308, 324 (1975).

Although some practices proscribed by the Act undoubtedly would have been actionable in common-law actions for fraud, "Congress intended the Investment Advisers Act to establish federal fiduciary standards for investment advisers." *Santa Fe Industries, Inc.* v. *Green*, 430 U. S., at 471, n. 11; *SEC* v. *Capital Gains Research Bureau, Inc.*, *supra*, at 191–192. While state law may be applied to parties subject to the Act, "as long as private causes of action are available in federal courts for violation of the federal statutes, [the] enforcement problem is obviated." *Burks* v. *Lasker*, 441 U. S. 471, 479, n. 6 (1979).

VI

Each of the *Cort* factors points toward implication of a private cause of action in favor of clients defrauded by investment advisers in violation of the Act. The Act was enacted for the special benefit of clients of investment advisers, and there is no indication of any legislative intent to deny such a cause of action, which would be consistent with the legislative scheme governing an area not traditionally relegated to state law. Under these circumstances an implied private right of action for damages should be recognized.

PERRIN *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–959. Argued October 3, 1979—Decided November 27, 1979

Petitioner, with others, was indicted for violating and conspiring to violate the Travel Act, 18 U. S. C. § 1952, which makes it a federal offense to travel or use a facility in interstate commerce to commit, *inter alia*, "bribery . . . in violation of the laws of the State in which committed." Petitioner and his codefendants were charged with using facilities of interstate commerce to promote a commercial bribery scheme in violation of the laws of Louisiana, *i. e.*, a scheme to exploit geological exploration data stolen from a Louisiana-based company by an employee of the company who was promised a percentage of the profits realized from exploitation of the information. Petitioner was convicted, and the Court of Appeals affirmed, rejecting the contention that Congress intended "bribery" in the Travel Act to include only bribery of public officials.

Held: Bribery of private employees prohibited by state criminal statutes violates the Travel Act. Pp. 41–50.

(a) By 1961, when the Act was enacted as part of a legislative program directed against "organized crime," the common understanding of "bribery" had extended beyond its early common-law definitions limiting it to bribery of public officials. In 42 States and in federal legislation, "bribery" included the bribery of individuals acting in a private capacity. Pp. 41–45.

(b) The generic definition of bribery, rather than a narrow common-law definition limited to public officials, was intended by Congress. References in the legislative history to the purposes and scope of the Travel Act, as well as other bills included in the package of "organized crime" legislation aimed at supplementing state enforcement, indicate that Members, Committees, and draftsmen used "bribery" to include payments to private individuals to influence their actions. Congress recognized in 1961 that bribery of private persons was widely used in highly organized criminal efforts to infiltrate and gain control of legitimate businesses, an area of special concern of Congress in enacting the Travel Act. Cf. *United States* v. *Nardello*, 393 U. S. 286. Pp. 45–49.

(c) Federalism principles do not dictate a narrow interpretation of "bribery" here. So long as the requisite interstate nexus is present (sufficiency of the nexus no longer being at issue in this case), the statute

reflects a clear and deliberate intent on Congress' part to alter the federal-state balance in order to reinforce state law enforcement. *Rewis* v. *United States*, 401 U. S. 808, distinguished. Pp. 49–50.

580 F. 2d 730, affirmed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except WHITE, J., who took no part in the decision of the case.

Leonard B. Boudin argued the cause for petitioner. With him on the briefs were *Robert G. Haik* and *Albert J. Ahern, Jr.*

Stephen M. Shapiro argued the cause for the United States. With him on the briefs were *Solicitor General McCree* and *Assistant Attorney General Heymann.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to resolve a Circuit conflict[1] on whether commercial bribery of private employees prohibited by a state criminal statute constitutes "bribery . . . in violation of the laws of the State in which committed" within the meaning of the Travel Act, 18 U. S. C. § 1952.

I

Petitioner Vincent Perrin and four codefendants[2] were indicted in the Eastern District of Louisiana for violating the Travel Act, 18 U. S. C. § 1952, and for conspiring to violate the Act, 18 U. S. C. § 371. The Travel Act provides in part:

"(a) Whoever travels in interstate or foreign commerce

[1] See *United States* v. *Brecht*, 540 F. 2d 45 (CA2 1976), cert. denied, 429 U. S. 1123 (1977) (holding no violation of the Travel Act); *United States* v. *Pomponio*, 511 F. 2d 953 (CA4), cert. denied, 423 U. S. 874 (1975) (holding a violation of the Travel Act).

[2] Also indicted with petitioner were Duffy LaFont, Jr., David Levy, Albert Izuel, and Jim Haddox. Proceedings against Izuel and Haddox were severed by the trial court, and the charges were subsequently dismissed.

or uses any facility in interstate or foreign commerce, including the mail, with intent to—

"(1) distribute the proceeds of any unlawful activity; or

"(2) commit any crime of violence to further any unlawful activity; or

"(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

"(b) As used in this subsection 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102 (6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States."

The indictment charged that Perrin and his codefendants used the facilities of interstate commerce for the purpose of promoting a commercial bribery scheme in violation of the laws of the State of Louisiana.[3]

Following a jury trial, Perrin was convicted on the conspiracy count and two substantive Travel Act counts. He

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[3] Louisiana's commercial bribery statute, La. Rev. Stat. Ann. § 14.73 (West 1974), provides in part:

"Commercial bribery is the giving or offering to give, directly or indirecuy, anything of apparent present or prospective value to any private agent, employee, or fiduciary, without the knowledge and consent of the principal or employer, with the intent to influence such agent's, employee's, or fiduciary's action in relation to the principal's or employer's affairs."

received a 1-year suspended sentence on each of the three counts.

The Government's evidence at trial was that Perrin, David Levy, and Duffy LaFont engaged in a scheme to exploit geological data obtained from the Petty-Ray Geophysical Co. Petty-Ray, a Louisiana-based company, was in the business of conducting geological explorations and selling the data to oil companies. At trial, company executives testified that confidentiality was imperative to the conduct of their business. The economic value of exploration data would be undermined if its confidentiality were not protected. Moreover, public disclosure after sale would interfere with the contractual rights of the purchaser and would otherwise injure Petty-Ray's relationship with its customers.

In June 1975 LaFont importuned Roger Willis, an employee of Petty-Ray, to steal confidential geological exploration data from his employer. In exchange, LaFont promised Willis a percentage of the profits of a corporation which had been created to exploit the stolen information. Willis' position as an analyst of seismic data gave him access to the relevant material, which he in turn surreptitiously provided to the conspirators. Perrin, a consulting geologist, was brought into the scheme to interpret and analyze the data.

In late July 1975 Perrin met with Willis, LaFont, and Levy. Perrin directed Willis to call a firm in Richmond, Tex., to obtain gravity maps to aid him in his evaluation.[4] After the meeting, Willis contacted the Federal Bureau of Investigation and disclosed the details of the scheme. Willis agreed to permit conversations between himself and the other participants to be recorded. Forty-seven tapes were made, a large number of which were played to the jury.

The United States Court of Appeals for the Fifth Circuit

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[4] The Government claimed at trial that Perrin purposefully chose an out-of-state supplier because it would be less likely to notice leasing activities in Louisiana.

affirmed Perrin's conviction, rejecting his contention that Congress intended "bribery" in the Act to include only bribery of public officials. The court also rejected challenges to the constitutionality of the Louisiana commercial bribery statute, to the sufficiency of the interstate nexus to establish jurisdiction under the Travel Act,[5] and to the failure of the trial judge to sever petitioner's trial from that of his codefendants.[6] 580 F. 2d 730.

II

Petitioner argues that Congress intended "bribery" in the Travel Act to be confined to its common-law definition, *i. e.*, bribery of a public official. He contends that because commercial bribery was not an offense at common law, the indictment fails to charge a federal offense.[7]

The Travel Act was one of several bills enacted into law by the 87th Congress as part of the Attorney General's 1961 legislative program directed against "organized crime." Then Attorney General Robert Kennedy testified at Senate and House hearings that federal legislation was needed to aid state and local governments which were no longer able to cope with the increasingly complex and interstate nature of large-scale, multiparty crime. The stated intent was to "dry up" traditional sources of funds for such illegal activities. Legislation Relating to Organized Crime: Hearings on H. R. 468, H. R. 1246, etc., before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. (1961)

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[5] Phone calls from Louisiana to Richmond, Tex., by Willis and Levy, and the subsequent shipment of materials by the Richmond firm to Louisiana by Continental Bus were held to provide the interstate nexus jurisdictionally required to support the Travel Act prosecutions.

[6] LaFont and Levy were also convicted; the Court of Appeals affirmed. Petitions for certiorari have been filed by both LaFont, No. 78–5930, and Levy, No. 78–5855, and are pending before this Court.

[7] Perrin's other contentions, including a claim that the asserted ambiguity of the Travel Act resulted in failure to provide adequate notice that his conduct violated federal as well as Louisiana laws, do not merit discussion.

(hereinafter House Hearings); The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings on S. 1653, S. 1654, etc., before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. (1961) (hereinafter Senate Hearings).

To remedy a gap in the authority of federal investigatory agencies, Congress employed its now familiar power under the Commerce Clause of the Federal Constitution to prohibit activities of traditional state and local concern that also have an interstate nexus. See, *e. g.*, 18 U. S. C. § 1201 (federal kidnaping statute); 18 U. S. C. § 2312 (interstate transportation of stolen automobiles). That Congress was consciously linking the enforcement powers and resources of the Federal and State Governments to deal with traditional state crimes is shown by its definition of "unlawful activity" as an "enterprise involving gambling, liquor . . . , narcotics or controlled substances . . . , or prostitution offenses in violation of the laws of the State in which they are committed or of the United States." The statute also makes it a federal offense to travel or use a facility in interstate commerce to commit "extortion [or] bribery . . . in violation of the laws of the State in which committed or of the United States." Because the offenses are defined by reference to existing state as well as federal law, it is clear beyond doubt that Congress intended to add a second layer of enforcement supplementing what it found to be inadequate state authority and state enforcement.

We begin with the language of the Travel Act itself. *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405 (1979); *TVA* v. *Hill*, 437 U. S. 153, 173 (1978). A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. *Burns* v. *Alcala*, 420 U. S. 575, 580–581 (1975). Therefore, we look to the ordinary meaning of the term "bribery" at the time Congress enacted the statute in 1961. In light of Perrin's contentions we con-

sider first the development and evolution of the common-law definition.

At early common law, the crime of bribery extended only to the corruption of judges. 3 E. Coke, Institutes *144, *147 (1628). By the time of Blackstone, bribery was defined as an offense involving a judge or "other person concerned in the administration of justice" and included the giver as well as the receiver of the bribe. 4 W. Blackstone, Commentaries *139–*140 (1765). The writings of a 19th-century scholar inform us that by that time the crime of bribery had been expanded to include the corruption of any public official and the bribery of voters and witnesses as well. J. Stephen, Digest of the Criminal Law 85–87 (1877). And by the 20th century, England had adopted the Prevention of Corruption Act making criminal the commercial bribery of agents and employees. Act of 1906, 6 Edw. 7, ch. 34, amended by the Prevention of Corruption Act of 1916, 6 & 7 Geo. 5, ch. 64.

In this country, by the time the Travel Act was enacted in 1961, federal and state statutes had extended the term bribery well beyond its common-law meaning. Although Congress chose not to enact a general commercial bribery statute, it perceived abuses in the areas it found required particular legislation. Federal statutes specifically using "bribery" in the sense of payments to private persons to influence their actions are the Transportation Act of 1940, 49 U. S. C. § 1 (17)(b) (prohibiting the "bribery" of agents or employees of common carriers), and the 1960 Amendments to the Communications Act, 47 U. S. C. § 509 (a)(2) (prohibiting the "bribery" of television game show contestants).[8]

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[8] Examples of federal statutes which make illegal the giving or receiving of payments to influence private duties but without using the word bribery are found at 18 U. S. C. § 215 (prohibiting payments to bank officers to influence their consideration of loans); 41 U. S. C. § 51 (prohibiting payments to contractors to secure subcontracts); and 29 U. S. C. § 186 (prohibiting payments to labor union officials).

A similar enlargement of the term beyond its common-law definition manifested itself in the states prior to 1961. Fourteen States had statutes which outlawed commercial bribery generally.[9] An additional 28 had adopted more narrow statutes outlawing corrupt payments to influence private duties in particular fields, including bribery of agents, common carrier and telegraph company employees, labor officials, bank employees, and participants in sporting events.[10]

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[9] The statutes are currently codified at Conn. Gen. Stat. §§ 53a–160, 53a–161 (West 1972) (enacted 1905); La. Rev. Stat. Ann. § 14.73 (West 1974) (enacted 1920); Mass. Gen. Laws Ann., ch. 271, § 39 (West 1970) (enacted 1904); Mich. Comp. Laws § 750.125 (1968) (enacted 1905); Miss. Code Ann. §§ 97–11–11, 97–11–13 (1973) (enacted 1857); Neb. Rev. Stat. § 28–710 (1975) (enacted 1907); N. Y. Penal Law §§ 180.00–180.03 (McKinney Supp. 1978–1979) (enacted 1905); N. C. Gen. Stat. § 14–353 (1969) (enacted 1913); Pa. Stat. Ann., Tit. 18, § 4108 (Purdon 1973) (enacted 1939); R. I. Gen. Laws §§ 11–7–3, 11–7–4 (1970) (enacted 1881); S. C. Code § 16–17–540 (1977) (enacted 1905); Vt. Stat. Ann., Tit. 13, § 1106 (1974) (enacted 1904); Va. Code § 18.2–444 (1975) (enacted 1950); Wis. Stat. § 134.05 (1978) (enacted 1905). Of these 14, most had also enacted other private bribery statutes reaching labor, banking, or sports bribery.

[10] The current codifications of the statutes are found at Ala. Code § 13–4–9 (1977) (sports); Alaska Stat. Ann. § 42.20.110 (1976) (telegraph agent); Ariz. Rev. Stat. Ann. § 4–243 (1974), § 13–2309 (1978) (alcoholic beverages, sports); Ark. Stat. Ann. § 41–3288 (1977), § 67–707 (1966) (sports, banking); Cal. Penal Code Ann. §§ 337b–337e, 641 (West 1970) and Cal. Fin. Code Ann. § 3350 (West 1968) (sports, telegraph agent, banking); Colo. Rev. Stat. § 18–5–403 (1978) (sports); Del. Code Ann., Tit. 28, §§ 701–704 (1975) (sports); Fla. Stat. § 838.12 (1976) (sports); Haw. Rev. Stat. § 708–880 (1976) (sports); Ill. Rev. Stat., ch. 38, §§ 29–1 to 29–3 (1977) (sports); Ind. Code §§ 35–18–10–1, 35–18–10–2, 35–18–12–1, 35–18–12–2 (1976) (common carrier, sports); Iowa Code § 722.3 (1979) (sports); Ky. Rev. Stat. § 244.600 (1972), § 518.040–050 (1975) (alcoholic beverages, sports); Me. Rev. Stat. Ann., Tit. 17, § 3601 (1965) (labor); Md. Ann. Code, Art. 27, §§ 24, 25 (1976) (sports); Minn. Stat. § 609.825 (1964) (sports); Mo. Rev. Stat. § 570.155 (1978) (sports); Mont. Code Ann. § 94–35–221 (1978) (telegraph agent); Nev. Rev. Stat. §§ 614.140, 707.120 (1973) (labor, telegraph agent); N. J. Stat. Ann. §§ 2A:91–1,

In sum, by 1961 the common understanding and meaning of "bribery" had extended beyond its early common-law definitions. In 42 States and in federal legislation, "bribery" included the bribery of individuals acting in a private capacity.[11] It was against this background that the Travel Act was passed.

III

On a previous occasion we took note of the sparse legislative history of the Travel Act. *Rewis* v. *United States*, 401 U. S. 808, 811 (1971). The record of the hearings and floor debates discloses that Congress made no attempt to define the statutory term "bribery," but relied on the accepted contemporary meaning. There are ample references to the bribery of state and local officials, but there is no indication that Congress intended to so limit its meaning. Indeed, references in the legislative history to the purposes and scope of the Travel Act, as well as other bills under consideration by Congress as part of the package of "organized crime" legislation aimed at supplementing state enforcement, indicate that

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2A:93–7, 2A:93–10 (West 1969) (banking, labor, sports); Ohio Rev. Code Ann. § 2915.06 (1975) (sports); Okla. Stat., Tit. 21, §§ 399, 400 (1971) (sports); Ore. Rev. Stat § 165.515 (1977) (telegraph agent); S. D. Comp. Laws Ann. § 36–18–28 (1967) (architects); Tenn. Code Ann. §§ 39–821, 39–824 to 39–826 (1975) (common carriers, sports); Tex. Penal Code Ann. §§ 32.43, 32.44 (1974) (attorneys, sports); Wash. Rev. Code §§ 49.44.020, 67.04.010 to 67.04.080 (1976) (sports, labor); W. Va. Code § 61–10–22 (1977) (sports).

Since 1961, of the eight States which had not adopted nonpublic official bribery statutes, Georgia, Kansas, New Hampshire, New Mexico, North Dakota, and Wyoming now have such statutes. Moreover, a number of the States which did not have a commercial bribery statute in 1961 do so today.

[11] See also ALI, Model Penal Code § 223.10, pp. 113–117, Comments (Tent. Draft No. 11, 1960) ("all relations which are recognized in a society as involving special trust should be kept secure from the corrupting influence of bribery"); ALI, Model Penal Code § 224.8 (Prop. Off. Draft 1962) (containing a specific prohibition against commercial bribery).

Members, Committees, and draftsmen used "bribery" to include payments to private individuals to influence their actions.

Senator Keating, for instance, expressed concern about the influence of gamblers and racketeers on athletics. He indicated his belief that the sports bribery scandals could be dealt with under the Travel Act. See Senate Hearings 327–328. Attorney General Kennedy in his opening statement in both the Senate and House hearings in 1961 expressed his concern that "gamblers have bribed college basketball players to shave points on games." House Hearings 25; Senate Hearings 6. In the consideration of a related bill to grant immunity to witnesses testifying in labor racketeering cases, repeated reference was made to the need to curb "bribery" of labor and management officials involved in labor disputes. See House Hearings 84. It is not suggested that the references to the immunity bill were intended to define the content of "bribery" in the Travel Act, yet they do indicate that Congress did not use the word in the narrow, common-law sense.

Petitioner also contends that commercial bribery is a "management" or "white-collar" offense not generally associated with organized criminal activities. See *United States* v. *Brecht*, 540 F. 2d 45, 50 (CA2 1976), cert. denied, 429 U. S. 1123 (1977). From this, he argues that Congress could not have intended to encompass commercial bribery within § 1952.

The notion that bribery of private persons is unrelated or unknown to what is called "organized crime" has no foundation. The hearings on the Travel Act make clear that a major area of congressional concern was with the infiltration by organized crime into legitimate activities. House Hearings 2 (remarks of Chairman Celler). Legitimate businesses had come to be used as a means for highly organized criminal activities to hide income derived from illegal sources. Moreover, Committees investigating these activities found that those who

infiltrated legitimate businesses often used the same criminal techniques to expand their operations and sales in the legitimate enterprises. Thus, in discussing the infiltration of organized groups into nongambling amusement games, the McClellan Committee reported that the organization achieved its holdings in legitimate business by "force, terror and the corruption of management, union and public officials." Final Report of the Select Committee on Improper Activities in the Labor or Management Field, S. Rep. No. 1139, 86th Cong., 2d Sess., 856 (1960).

Indeed, the McClellan Committee in 1960, like the Kefauver Committee in 1950–1951, documented numerous specific instances of the use of commercial bribery by these organized groups to control legitimate businesses. The McClellan Committee, for example, reported that a particular "shylocking" operation began in New York when persons were able to obtain a substantial unsecured line of credit at a New York bank "by making gifts to two of the bank officials." *Id.*, at 772–773. The Kefauver Committee explored, among numerous others, the relationship between a high-ranking official of the Ford Motor Co. and persons believed to be members of organized illegal groups. Its evidence suggested that organized crime had exploited that relationship to obtain Ford dealerships and hauling contracts. Third Interim Report of the Special Committee to Investigate Organized Crime in Interstate Commerce, S. Rep. No. 307, 82d Cong., 1st Sess., 75 (1951). See also *id.*, at 160–161 (expressing concern about "corruption of college basketball players who could be talked into controlling the score of a game").[12]

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[12] Although congressional hearings subsequent to the passage of the Travel Act are not relied on, they do support the conclusion that bribery of private persons is a familiar tool of organized criminal groups. See Organized Crime, Stolen Securities: Hearings before the Subcommittee on Investigations of the Senate Committee on Government Operations, 92d Cong., 1st Sess., 675–683 (1971) (bribing of employees of banking institu-

There can be little doubt that Congress recognized in 1961 that bribery of private persons was widely used in highly organized criminal efforts to infiltrate and gain control of legitimate businesses, an area of special concern of Congress in enacting the Travel Act.

Our approach to ascertaining the meaning of "bribery" must be guided by our holding in *United States* v. *Nardello*, 393 U. S. 286 (1969), where the same provision of the Act under review in this case was before the Court. There, the respondents were charged with traveling in interstate commerce with the intent to engage in extortion contrary to the laws of Pennsylvania in violation of § 1952. Pennsylvania's "extortion" statute applied only to acts committed by public officials. However, the State had outlawed the particular conduct engaged in by the appellees under a statute entitled "blackmail." Nardello and his codefendants argued, as Perrin does here, that Congress intended to use the word "extortion" in its common-law sense, which would be limited to conduct by public officials.

An opinion by Mr. Chief Justice Warren for a unanimous Court rejected the argument limiting the definition of extortion to its common-law meaning, holding that Congress used the term in a generic and contemporary sense. The Court noted that in 1961 the Attorney General had pressed Congress to include "shakedown rackets," "shylocking," and labor extortion, which were methods frequently used by organized groups to generate income and infiltrate legitimate activities.

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tions to accept pledges of worthless and stolen securities and of employees of brokerage houses to steal securities); Organized Crime, Techniques for Converting Worthless Securities into Cash: Hearings before the House Select Committee on Crime, 92d Cong., 1st Sess., 3, 242, 292–293, 361 (1971) (bribing of insurance company presidents to buy worthless securities for the company); Organized Crime, Securities: Thefts and Frauds: Hearings before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 93d Cong., 1st Sess., 183, 239–240, 467–468, 475–476 (1973) (bribing of certified public accountants and employees in financial institutions and brokerage houses).

In rejecting Nardello's argument that Congress intended to adopt the common-law meaning of the term "extortion," the Court stated:

> "In light of the scope of the congressional purpose we decline to give the term 'extortion' an unnaturally narrow reading . . . and thus conclude that the acts for which appellees have been indicted fall within the generic term extortion as used in the Travel Act." 393 U. S., at 296.

We are similarly persuaded that the generic definition of bribery, rather than a narrow common-law definition, was intended by Congress.[13]

IV

Petitioner also contends that a broad interpretation of the meaning of bribery will have serious federalism implications. He relies particularly on *Rewis* v. *United States*, 401 U. S. 808 (1971). See also *United States* v. *Bass*, 404 U. S. 336, 349–350 (1971). The factual setting in *Rewis* was very different from this case. There, we were confronted with a Travel Act prosecution of the proprietors of a gambling establishment located a few miles south of the Georgia-Florida state line. There was no evidence that Rewis had employed interstate facilities to conduct his numbers operation; moreover, he could not readily identify which customers had crossed state lines. The District Court had instructed the jury that if it found that third persons traveled from Georgia

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[13] Our analysis leads us to reject the application of the maxim of statutory construction that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. *Bell* v. *United States*, 349 U. S. 81, 83 (1955). Although *Bell* states the general rule in cases where the courts are faced with genuine ambiguity, the rule of lenity applies "'when we are uncertain about the statute's meaning,'" and is "'not to be used in complete disregard of the purpose of the legislature.'" *United States* v. *Culbert*, 435 U. S. 371, 379 (1978), quoting *Scarborough* v. *United States*, 431 U. S. 563, 577 (1977). *Nardello* leaves little room for uncertainty about the statute's meaning.

to Florida to place bets, that would be sufficient to supply the interstate commerce element necessary to sustain the conviction of the proprietors under the Act. In reversing, we cautioned that in that setting "an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and . . . would transform relatively minor state offenses into federal felonies." 401 U. S., at 812.

Reliance on the federalism principles articulated in *Rewis* to dictate a narrow interpretation of "bribery" is misplaced. Our concern there was with the tenuous interstate commerce element. Looking at congressional intent in that light, we held that Congress did not intend that the Travel Act should apply to criminal activity within one State solely because that activity was sometimes patronized by persons from another State. *Ibid.*

Here, the sufficiency of the interstate nexus is no longer at issue. Rather, so long as the requisite interstate nexus is present, the statute reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement. In defining an "unlawful activity," Congress has clearly stated its intention to include violations of state as well as federal bribery law. Until statutes such as the Travel Act contravene some provision of the Constitution, the choice is for Congress, not the courts.

We hold that Congress intended "bribery . . . in violation of the laws of the State in which committed" as used in the Travel Act to encompass conduct in violation of state commercial bribery statutes. Accordingly, the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITE took no part in the decision of this case.

ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* ALLARD ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

No. 78-740. Argued October 1, 1979—Decided November 27, 1979

The Eagle Protection Act makes it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" bald or golden eagles or any part thereof, with the proviso that the prohibition does not apply to "possession or transportation" of such eagles or parts thereof taken prior to the effective date of the Act. Similarly, the Migratory Bird Treaty Act makes it unlawful to engage in such activities with respect to migratory birds and their parts, unless they are permitted by regulations promulgated under the Act. Appellant Secretary of the Interior promulgated regulations prohibiting commercial transactions in parts of birds legally killed before they came under the protection of these Acts. After two of the appellees who had sold "pre-existing" Indian artifacts partly composed of feathers of currently protected birds were prosecuted for violations of both Acts, appellees, who are engaged in the trade of such artifacts, brought suit in District Court for declaratory and injunctive relief, alleging that the Acts do not forbid the sale of appellees' artifacts insofar as the constituent bird parts were obtained prior to the effective dates of the Acts, and that if the Acts and regulations do apply to such property, they violate the Fifth Amendment. The District Court granted the relief sought, holding that the Acts were to be interpreted as not applicable to pre-existing, legally obtained bird parts, and that therefore the regulations were void as unauthorized extensions of the Acts and were violative of appellees' Fifth Amendment property rights.

Held:

1. Both Acts contemplate regulatory prohibition of commerce in the parts of protected birds, without regard to when those birds were originally taken. Pp. 55-64.

(a) In view of the exhaustive and careful enumeration of forbidden acts in the Eagle Protection Act, the narrow limitation of the proviso to "possession or transportation" compels the conclusion that, with respect to pre-existing artifacts, Congress specifically declined to except any activities other than *possession* and *transportation* from the general ban. The legislative history shows that this precise use of terminology

was intentional. Moreover, the prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the Act's purpose of preventing evasion of the statutory prohibitions for commercial gain. Pp. 56–59.

(b) While the Migratory Bird Treaty Act contains no explicit exception for the possession or transportation of bird parts obtained before the federal protection became effective, nevertheless the text, context, and purpose of that Act support the Secretary's interpretative regulations. There is nothing in the Act that *requires* an exception for the sale of pre-existing artifacts, and no such statutory exception can be implied. The Act's structure and context also suggest congressional understanding that regulatory authorities could ban the sale of lawfully taken birds, except where otherwise expressly instructed by the Act. Pp. 59–64.

2. The simple prohibition of the sale of lawfully acquired property does not effect a taking in violation of the Fifth Amendment. The challenged regulations do not compel the surrender of the artifacts in question, and there is no physical invasion or restraint upon them. The denial of one traditional property right does not always amount to a taking. Nor is the fact that the regulations prevent the most profitable use of appellees' property dispositive, since a reduction in the value of property is not necessarily equated with a taking. Pp. 64–68.

Reversed.

BRENNAN, J., delivered the opinion of the Court, in which STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. BURGER, C. J., concurred in the judgment.

Harriet S. Shapiro argued the cause for appellants. With her on the briefs were *Solicitor General McCree, Assistant Attorney General Moorman, Robert L. Klarquist,* and *Edward J. Shawaker.*

John P. Akolt III argued the cause for appellees. With him on the brief was *John P. Akolt, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Eagle Protection Act and the Migratory Bird Treaty Act are conservation statutes designed to prevent the de-

struction of certain species of birds.[1] Challenged in this case is the validity of regulations promulgated by appellant Secretary of the Interior that prohibit commercial transactions in parts of birds legally killed before the birds came under the

[1] The Eagle Protection Act, § 1, 54 Stat. 250, as amended, as set forth in 16 U. S. C. § 668 (a), provides in pertinent part:

"Whoever, within the United States or any place subject to the jurisdiction thereof, without being permitted to do so as provided in this subchapter, shall knowingly, or with wanton disregard for the consequences of his act take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import, at any time or in any manner any bald eagle commonly known as the American eagle or any golden eagle, alive or dead, or any part, nest, or egg thereof of the foregoing eagles, or whoever violates any permit or regulation issued pursuant to this subchapter, shall be fined not more than $5,000 or imprisoned not more than one year or both: . . . *Provided further*, That nothing herein shall be construed to prohibit possession or transportation of any bald eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to June 8, 1940, and that nothing herein shall be construed to prohibit possession or transportation of any golden eagle, alive or dead, or any part, nest, or egg thereof, lawfully taken prior to the addition to this subchapter of the provisions relating to preservation of the golden eagle."

The Migratory Bird Treaty Act, § 2, 40 Stat. 755, as amended, as set forth in 16 U. S. C. § 703, similarly provides:

"Unless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export, any migratory bird, any part, nest, or eggs of any such bird, or any product, whether or not manufactured, which consists, or is composed in whole or part, of any such bird or any part, nest, or egg thereof, included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972."

protection of the statutes. The regulations provide in pertinent part:

50 CFR § 21.2 (a) (1978):

> "Migratory birds, their parts, nests, or eggs, lawfully acquired prior to the effective date of Federal protection under the Migratory Bird Treaty Act . . . may be possessed or transported without a Federal permit, but may not be imported, exported, purchased, sold, bartered, or offered for purchase, sale, trade, or barter. . . ."

50 CFR § 22.2 (a) (1978):

> "Bald eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to June 8, 1940, and golden eagles, alive or dead, or their parts, nests, or eggs lawfully acquired prior to October 24, 1962, may be possessed, or transported without a Federal permit, but may not be imported, exported, purchased, sold, traded, bartered, or offered for purchase, sale, trade or barter. . . ."

Appellees are engaged in the trade of Indian artifacts: several own commercial enterprises, one is employed by such an enterprise, and one is a professional appraiser. A number of the artifacts are partly composed of the feathers of currently protected birds, but these artifacts existed before the statutory protections came into force. After two of the appellees who had sold "pre-existing" artifacts were prosecuted for violations of the Eagle Protection Act and the Migratory Bird Treaty Act,[2] appellees brought this suit for declaratory and injunctive relief in the District Court for the District of Colorado. The complaint alleged that the statutes do not

[2] Appellee L. Douglas Allard was convicted and fined for violating the Eagle Protection Act, 16 U. S. C. § 668 (a), which establishes criminal penalties for unpermitted eagle sales. *United States* v. *Allard*, 397 F. Supp. 429 (Mont. 1975). Appellee Pierre Bovis was prosecuted under the Eagle Protection Act and under the Migratory Bird Treaty Act, 16 U. S. C. § 707, which provides criminal penalties for the unlawful sale of migratory birds. *United States* v. *Bovis*, Nos. 75–CR–63 and 75–CR–66 (Colo. 1975).

forbid the sale of appellees' artifacts insofar as the constituent birds' parts were obtained prior to the effective dates of the statutes. It further alleged that if the statutes and regulations do apply to such property, they violate the Fifth Amendment.[3]

A three-judge court, convened pursuant to 28 U. S. C. § 2282 (1970 ed.),[4] held that because of "grave doubts whether these two acts would be constitutional if they were construed to apply to pre-act bird products," the Acts were to be interpreted as "not applicable to preexisting, legally-obtained bird parts or products therefrom. . . ." App. to Juris. Statement 13a–14a. Accordingly, the court ruled that "the interpretive regulations, 50 C. F. R. §§ 21.2 (a) and 22.2 (a) [are] void as unauthorized extensions of the Migratory Bird Treaty Act and the Eagle Protection Act and [are] violative of the [appellees'] Fifth Amendment property rights." *Id.*, at 14a. Judgment was entered declaring "the subject regulations to be invalid and unenforceable as against the [appellees'] property rights in feathers and artifacts owned before the effective date of the subject statute," and enjoining appellants "from any interference with the exercise of such rights, including the rights of sale, barter or exchange." *Id.*, at 16a–17a. We noted probable jurisdiction. 440 U. S. 905 (1979). We reverse.

I

Appellant Secretary of the Interior contends that both the Eagle Protection and Migratory Bird Treaty Acts contem-

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[3] Appellees also alleged that the Migratory Bird Treaty Act and regulations thereunder were unconstitutionally vague and involved an improper delegation of legislative power to the Executive Branch. These allegations were not passed on by the District Court and are not pressed here. We therefore do not address them.

[4] The Secretary contends that appellees' constitutional claims are insubstantial and did not justify convention of a three-judge court. We disagree. See *Goosby* v. *Osser*, 409 U. S. 512 (1973); *Hagans* v. *Lavine*, 415 U. S. 528, 536–538 (1974).

plate regulatory prohibition of commerce in the parts of protected birds, without regard to when those birds were originally taken. Appellees respond that such a prohibition serves no purpose, arguing that statutory protection of wildlife is not furthered by an embargo upon traffic in avian artifacts that existed before the statutory safeguards came into effect.

A

Our point of departure in statutory analysis is the language of the enactment. See *Southeastern Community College* v. *Davis*, 442 U. S. 397, 405 (1979). "Though we may not end with the words in construing a disputed statute, one certainly begins there." F. Frankfurter, Some Reflections on the Reading of Statutes 16 (1947).

The terms of the Eagle Protection Act plainly must be read as appellant Secretary argues. The sweepingly framed prohibition in § 668 (a) makes it unlawful to "take, possess, sell, purchase, barter, offer to sell, purchase or barter, transport, export or import" protected birds. Congress expressly dealt with the problem of pre-existing bird products by qualifying that general prohibition with the proviso that "nothing herein shall be construed to prohibit *possession or transportation*" of bald or golden eagle parts taken prior to the effective date of coverage under the Act. (Emphasis supplied.)

In view of the exhaustive and careful enumeration of forbidden acts in § 668 (a), the narrow limitation of the proviso to "possession or transportation" compels the conclusion that, with respect to pre-existing artifacts, Congress specifically declined to except any activities other than *possession* and *transportation* from the general statutory ban. To read a further exemption for pre-existing artifacts into the Eagle Protection Act, "we would be forced to ignore the ordinary meaning of plain language." *TVA* v. *Hill*, 437 U. S. 153, 173 (1978). Nor can there be any question of oversight or drafting error. Throughout the statute the distinct concepts of

possession, transportation, taking, and sale or purchase are treated with precision. The broad proscriptive provisions of the Eagle Protection Act were consistently framed to encompass a full catalog of prohibited acts, always including sale or purchase. See §§ 668 (a), 668 (b), 668b (b). In contrast, the exemptions created were specifically limited to possession or transportation, § 668 (a),[5] taking, § 668a,[6] or taking, possession, or transportation, *ibid.*[7]

That this precise use of terminology was intentional is clear from the legislative history. An explanatory letter from the Department of Agriculture that was adopted in the Senate Report on the bill defines the reach of the Eagle Protection Act to make it unlawful to

> "take, possess, sell, purchase, transport, or otherwise deal with the bald eagle . . . with the proviso to the effect that it will not apply to the *possession* or *transportation* of any such eagle . . . taken prior to the effective date of the bill." S. Rep. No. 1589, 76th Cong., 3d Sess., 1 (1940). (Emphasis added.)

Further, when Congress amended the Eagle Protection Act in 1962 to cover golden eagles, it once again excepted only possession and transportation of pre-existing artifacts from the general ban. 76 Stat. 1246. And it is particularly relevant that Congress has twice reviewed and amended the statute without rejecting the Department's view that it is authorized to bar the sale of pre-existing artifacts.[8] Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974).

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[5] Exemption for pre-existing artifacts.

[6] Exemption for takings necessary to protect wildlife, livestock, or agriculture from predation.

[7] Exemption for scientific, zoological, or religious needs and, in certain circumstances, for falconry.

[8] In 1962, Congress extended the Eagle Protection Act to cover golden, as well as bald, eagles, 76 Stat. 1246, and in 1972 penalties under the statute were reinforced, 86 Stat. 1064. On each occasion—especially the

The prohibition against the sale of bird parts lawfully taken before the effective date of federal protection is fully consonant with the purposes of the Eagle Protection Act. It was reasonable for Congress to conclude that the possibility of commercial gain presents a special threat to the preservation of the eagles because that prospect creates a powerful incentive both to evade statutory prohibitions against taking birds and to take a large volume of birds. The legislative draftsmen might well view evasion as a serious danger because there is no sure means by which to determine the age of bird feathers; feathers recently taken can easily be passed off as having been obtained long ago.[9]

Appellees argue that even if the age of feathers cannot be ascertained, it is still possible to date the Indian artifacts of which the feathers are a constituent. Thus, they contend that the goal of preventing evasion of the statute could have been achieved by means less onerous than a general sales ban: for example, by requiring documentation and appraisal of feathered artifacts. The short answer is that this legislation is not limited to the sale of feathers as part of artifacts; it broadly addresses sale or purchase of feathers and other bird parts in any shape or form. The prohibitions of the statute were devised to resist any evasion, whether in the sale of feathers as part of datable artifacts or in the sale of separate undatable bird products. Moreover, even if there were alternative ways to insure against statutory evasion, Congress was free to choose the method it found most efficacious and con-

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latter—the purposes and scheme of the bill were considered. S. Rep. No. 1986, 87th Cong., 2d Sess. (1962); H. R. Rep. No. 1450, 87th Cong., 2d Sess. (1962); S. Rep. No. 92-1159 (1972); H. R. Rep. No. 92-817 (1972). Regulations preventing the sale of pre-existing artifacts had been in force for some time preceding these amendments, see 50 CFR § 6.1 (Cum. Supp. 1944); 50 CFR §§ 11.1 and 11.8 (b) (1964); 50 CFR § 22.2 (1978), although the wording of the 1960 regulation may suggest otherwise, 50 CFR §§ 11.1 and 11.6 (b) (1961).

[9] See Affidavit of Dr. Alan H. Brush, App. 44–46.

venient. "[T]he legislature . . . is authorized to pass measures for the protection of the people . . . in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted."[10] *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 40 (1908).

B

The fundamental prohibition in the Migratory Bird Treaty Act is couched in language as expansive as that employed in the Eagle Protection Act. Title 16 U. S. C. § 703 provides that

> "[u]nless and except as permitted by regulations made as hereinafter provided in this subchapter, it shall be unlawful . . . to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell, offer to barter, barter, offer to purchase, purchase, deliver for shipment, ship, export, import, cause to be shipped, exported, or imported, deliver for transportation, transport or cause to be transported, carry or cause to be carried, or receive for shipment, transportation, carriage, or export"

protected birds. But the Migratory Bird Treaty Act contains no explicit exception for the possession or transportation of

[10] Our reading of the Eagle Protection Act is not shaken by the fact that, until 1959, Alaska was exempted from the strictures of § 668. See 54 Stat. 250, amended by § 14, 73 Stat. 143. The fact that eagles could be taken, possessed, sold, and purchased in the Territory of Alaska in no way undercut the general ban on sales in the 48 States; we do not read the pre-1959 Alaska exemption as a license to sell Alaska eagles in the rest of the country, or vice versa.

We are also unpersuaded by appellees' argument that the Eagle Protection Act does not apply to feathers that have lost their "identities" as elements in artifacts. This contention is bottomed on the statutory use of the word bird "part" instead of bird "product." The distinction between the terms is immaterial: for example, when Congress amended the Migratory Bird Treaty Act to specify that it applied to bird products as well as bird parts, Pub. L. 93-300, 88 Stat. 190, the Senate Report

bird parts obtained before the federal protection became effective: that exception is created by the Secretary's regulation. 50 CFR § 21.2 (1978). Unlike our analysis under the Eagle Protection Act, therefore, reliance upon the negative inference from a narrow statutory exemption for the transportation or possession of pre-existing artifacts is precluded.[11] Nevertheless, the text, context, and purpose of the Migratory Bird Treaty Act support the Secretary's interpretative regulations of that enactment.

On its face, the comprehensive statutory prohibition is naturally read as forbidding transactions in all bird parts, including those that compose pre-existing artifacts. While there is no doubt that regulations may exempt transactions from the general ban,[12] nothing in the statute *requires* an exception for the sale of pre-existing artifacts. And no such statutory exception can be implied. When Congress wanted an exemption from the statutory prohibition, it provided so in unmistakable terms. Cf. 16 U. S. C. § 711.[13]

The structure and context of this enactment—to the extent that they enlighten—also suggest congressional understanding that regulatory authorities could ban the sale of lawfully

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indicated that the change was a clarification rather than a substantive change in the reach of the law. S. Rep. No. 93–851, p. 3 (1974).

[11] The Migratory Bird Treaty Act, passed in 1918, 40 Stat. 755, predates the Eagle Protection Act by 22 years. Originally the legislation implementing a Migratory Bird Convention between Great Britain (on behalf of Canada) and the United States, the Act now implements similar treaties between this country and other nations. See generally Coggins & Patti, The Resurrection and Expansion of the Migratory Bird Treaty Act, 50 Colo. L. Rev. 165, 169–174 (1979); M. Bean, The Evolution of National Wildlife Law 68–74 (1977).

[12] The § 703 prohibition is, by its own terms, subject to regulatory exception. See also 16 U. S. C. § 704.

[13] "Nothing in this subchapter shall be construed to prevent the breeding of migratory game birds on farms and preserves and the sale of birds so bred under proper regulation for the purpose of increasing the food supply."

taken birds, except where otherwise expressly instructed by the statute. If Congress had assumed that lawfully taken birds could automatically be sold under the Act, it would have been unnecessary to specify in § 711 that it is permissible under certain circumstances to sell game birds lawfully bred on farms and preserves.[14] Furthermore, Congress could not have been unaware that a traditional legislative tool for enforcing conservation policy was a flat proscription on the sale of wildlife, without regard to the legality of the taking. At the time, a number of States, for example, simply prohibited or restricted possession or sale of wildlife during seasons closed to hunting. See *New York ex rel. Silz* v. *Hesterberg, supra,* at 40. Also before Congress was the Canadian law implementing the Migratory Bird Treaty,[15] and that law itself contained a provision barring the purchase, sale, or possession of protected bird parts *"during the time* when the capturing, killing, or taking of such bird, nest, or egg is prohibited by law," 55 Cong. Rec. 5412 (1917).[16] (Emphasis added.) The Canadian sale ban—of which Congress was aware—thus applied not to illegally taken birds, but rather to all protected birds during the season in which hunting was prohibited. Against this background, the absence of a statutory exemption for pre-existing avian artifacts implies that the Migratory Bird Treaty Act was intended to embrace the traditional conservation technique of banning transactions in protected birds, whenever taken.

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[14] In fact, the Conference Report accepting the floor amendment that became § 711 was actually withdrawn in order to add language indicating that lawfully bred birds could be sold. See 56 Cong. Rec. 8015 (1918); *id.,* at 8130, 8430.

[15] 55 Cong. Rec. 5412–5413 (1917) (Senate); 56 Cong. Rec. 7372 (1918) (House).

Britain entered into the treaty on behalf of Canada.

[16] The Canadian statute indicates that there might be a lawful excuse for possessing or selling birds out of season, but not what such an excuse would be.

Related statutes may sometimes shed light upon a previous enactment. Cf. *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 429 (CA2 1945) (L. Hand, J.). Other conservation legislation enacted by Congress has employed the enforcement technique of forbidding the sale of protected wildlife without respect to the lawfulness of the taking. The Eagle Protection Act is a notable example. The more recent Endangered Species Act of 1973, as originally framed, prohibited the sale of products or parts of endangered species, without an exception for those products legally held for commercial purposes at the time of the Act's passage.[17] See 16 U. S. C. § 1538; *United States* v. *Kepler*, 531 F. 2d 796 (CA6 1976); *Delbay Pharmaceuticals, Inc.* v. *Department of Commerce*, 409 F. Supp. 637, 641–642, 644 (DC 1976); see also H. R. Rep. No. 94–823, pp. 3–4 (1976) (discussing an amendment to the Endangered Species Act). And when Congress has meant to exempt lawfully taken items from the retroactive application of statutory prohibitions, it has taken care to do so explicitly, see 16 U. S. C. § 1372 (Marine Mammal Protection Act of 1972); 16 U. S. C. § 1538 (b) (Endangered Species Act of 1973), or it has specifically amended the statute for that purpose, see 90 Stat. 911, amending 16 U. S. C. § 1539 (Endangered Species Act); 92 Stat. 3760, amending 16 U. S. C. §§ 1538 and 1539 (Endangered Species Act). In contrast, Congress has never established a pre-existing-artifacts exception to the Migratory Bird Treaty Act, even though it has amended the statute on several occasions.[18]

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[17] In 1976, Congress specifically amended the Act to establish a very limited sales exemption for products of animals lawfully owned for commercial purposes before the Act came into effect. Pub. L. 94–359, 90 Stat. 911, amending 16 U. S. C. § 1539. The amendment was circumscribed in scope and merely *authorized* but did not *order* the Secretary of Commerce to grant exemptions for pre-Act animal products.

[18] In arguing the position that the statute prevents only the sale of illegally taken birds, appellees rely upon the language of the 1972 Migratory Bird Convention with Japan, incorporated into the Migratory Bird

We are therefore persuaded that the Migratory Bird Treaty Act empowers the Secretary of the Interior to bar commercial transactions in covered bird parts in spite of the fact that the parts were lawfully taken before the onset of federal protection. We see no indication to the contrary.[19] It follows

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Treaty Act in 1974. Pub. L. 93–300, 88 Stat. 190. The Convention provides that "[a]ny sale, purchase or exchange of these [migratory] birds or their eggs, *taken illegally*, alive or dead, and any sale, purchase or exchange of the products thereof or their parts shall . . . be prohibited." (Emphasis added.) But the language of the Convention, like the terms of the other Conventions, does not carry great weight in the interpretation of the statute. There are material variations in the particulars of each of the Conventions, see Coggins & Patti, *supra* n. 11, at 173–174; Bean, *supra* n. 11, at 70–73; it is therefore hazardous to look to any single Convention for definitive resolution of a statutory construction problem. Furthermore, inasmuch as the Conventions represent binding international commitments, they establish *minimum* protections for wildlife; Congress could and did go further in developing domestic conservation measures. See *id.*, at 74–76.

[19] Our interpretation of the statute does not depart from any course of construction adopted by other courts. Although appellees argue that several courts have determined that lawfully taken birds may be sold under the Migratory Bird Treaty Act, we do not read the cases as supporting appellees' position. Two of the cited cases, *United States* v. *Hamel*, 534 F. 2d 1354 (CA9 1976) (*per curiam*), and *United States* v. *Blanket*, 391 F. Supp. 15 (WD Okla. 1975), neither decide nor imply a decision as to the statutory question posed here. Language favorable to appellees in *United States* v. *Aitson*, No. 74–1588 (CA10, July 21, 1975), is merely dictum in an unpublished opinion. Contrast also *United States* v. *Richards*, 583 F. 2d 491 (CA10 1978). *United States* v. *Marks*, 4 F. 2d 420 (SD Tex. 1925), did hold it impermissible to punish the sale of birds taken before the Migratory Bird Treaty Act was passed. But that ruling rested upon the court's view that Congress' authority to regulate the birds must rest wholly upon the treaty rather than the commerce power. Whatever the logic of that ruling, the underlying assumption that the national commerce power does not reach migratory wildlife is clearly flawed. See, *e. g.*, *Hughes* v. *Oklahoma*, 441 U. S. 322 (1979). Thus, only two early District Court cases, both authored by the same judge, sustain the statutory proposition advanced by appellees. *United States* v. *Fuld Store Co.*, 262 F. 836 (Mont. 1920); *In re Informations Under Migratory Bird Treaty*

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that the Secretary could properly permit the possession or transportation, and not the sale or purchase, of pre-existing bird artifacts.[20] Accordingly, we disagree with the District Court's interpretation of the Act as inapplicable to pre-existing legally obtained bird parts.

II

We also disagree with the District Court's holding that, as construed to authorize the prohibition of commercial transactions in pre-existing avian artifacts, the Eagle Protection and Migratory Bird Treaty Acts violate appellees' Fifth Amendment property rights because the prohibition wholly deprives them of the opportunity to earn a profit from those relics.[21]

Act, 281 F. 546 (Mont. 1922). The cases involved no more than a cursory inquiry into the statute, and we find them unconvincing.

[20] Indeed, heightened restrictions on the sale or purchase of migratory bird parts were appropriate in light of congressional recognition of the danger to wildlife posed by commercial exploitation. The 1960 amendments to the Migratory Bird Treaty Act specifically addressed that problem by stiffening penalties for the taking of protected birds with intent to sell and for the sale of protected birds. 74 Stat. 866; see H. R. Rep. No. 1787, 86th Cong., 2d Sess. (1960); S. Rep. No. 1779, 86th Cong., 2d Sess. (1960).

[21] Although this argument appears to have been cast in the District Court in terms of economic substantive due process, before this Court appellees have used the terminology of the Takings Clause.

The Secretary has raised the question of appellees' standing to assert a takings claim with respect to their artifacts. He asserts that appellees have not clearly stated that they acquired their property interest in the bird artifacts before the sales ban came into force. If they have not, the Secretary argues, then the "value of any artifacts purchased by appellees *after* the effective date of the Act had already been diminished by the applicability of the Act." Brief for Appellants 30. This contention is misplaced. Even assuming that appellees have not sufficiently alleged pre-effectiveness possession, they have standing to urge their constitutional claim. Because the regulation they challenge restricts their ability to dispose of their property, appellees have a personal, concrete, live interest in the controversy. See *Baker* v. *Carr*, 369 U. S. 186, 204 (1962). The

Penn Central Transportation Co. v. *New York City*, 438 U. S. 104, 123–128 (1978), is our most recent exposition on the Takings Clause. That exposition need not be repeated at length here. Suffice it to say that government regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 413 (1922); see *Penn Central*, *supra*, at 124.

The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of "'justice and fairness.'" *Ibid.*; see *Goldblatt* v. *Hempstead*, 369 U. S. 590, 594 (1962). There is no abstract or fixed point at which judicial intervention under the Takings Clause becomes appropriate. Formulas and factors have been developed in a variety of settings. See *Penn Central*, *supra*, at 123–128. Resolution of each case, however, ultimately calls as much for the exercise of judgment as for the application of logic.

The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner pos-

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timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold. Of course, there is no standing to assert a takings claim by those who are merely employed in selling artifacts owned by others. All appellees, however, may face future criminal prosecutions for violations of the statutes, and that, of itself, suffices to give them standing to litigate their interest in the construction of the statutes.

sesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. Compare *Penn Central, supra,* at 130–131, and *United States* v. *Twin City Power Co.,* 350 U. S. 222 (1956), with *Pennsylvania Coal Co.* v. *Mahon, supra,* and *United States* v. *Virginia Electric & Power Co.,* 365 U. S. 624 (1961). See also Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1230–1233 (1967). In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. Compare *Goldblatt* v. *Hempstead, supra,* at 594, and *Hadacheck* v. *Sebastian,* 239 U. S. 394 (1915), with *Pennsylvania Coal Co.* v. *Mahon, supra.*[22] In the instant case, it is not clear that appellees will be unable to derive economic benefit from the artifacts; for example, they might exhibit the artifacts for an admissions charge. At any rate, loss of future profits—unaccompanied by any physical property restriction—provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests. Cf., *e. g.,* Fuller & Perdue, The Reliance Interest in Contract Damages (pt. 1), 46 Yale L. J. 52 (1936).

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[22] It should be emphasized that in *Pennsylvania Coal* the loss of profit opportunity was accompanied by a physical restriction against the removal of the coal.

Regulations that bar trade in certain goods have been upheld against claims of unconstitutional taking. For example, the Court has sustained regulations prohibiting the sale of alcoholic beverages despite the fact that individuals were left with previously acquired stocks. *Everard's Breweries* v. *Day*, 265 U. S. 545 (1924), involved a federal statute that forbade the sale of liquors manufactured before passage of the statute. The claim of a taking in violation of the Fifth Amendment was tersely rejected. *Id.*, at 563.[23] Similarly, in *Jacob Ruppert, Inc.* v. *Caffey*, 251 U. S. 264 (1920), a federal law that extended a domestic sales ban from intoxicating to non-intoxicating alcoholic beverages "on hand at the time of the passage of the act," *id.*, at 302, was upheld. Mr. Justice Brandeis dismissed the takings challenge, stating that "there was no appropriation of private property, but merely a lessening of value due to a permissible restriction imposed upon its use." [24] *Id.*, at 303. See *Mugler* v. *Kansas*, 123 U. S. 623 (1887).

It is true that appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure "the advantage of living and doing business in a civilized community." *Pennsylvania Coal Co.* v. *Mahon*, *supra*, at 422 (Brandeis, J., dissenting). We hold that the simple prohibition of the sale of lawfully acquired property in this

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[23] It is not significant that the statute considered in *Everard's Breweries* had been passed under the Eighteenth (Prohibition) Amendment. The Court did not suggest that the Amendment gave Congress a special prerogative to override ordinary Fifth Amendment limitations.

[24] Although the beverage owner in *Jacob Ruppert* retained the ability to export his product or to sell it domestically for purposes other than consumption, see 251 U. S., at 303; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146, 157 (1919), the domestic sales ban was undoubtedly commercially crippling.

No importance should be attached to the fact that the enactment in *Jacob Ruppert* was promulgated pursuant to the war power. But cf. *United States* v. *Central Eureka Mining Co.*, 357 U. S. 155, 168 (1958).

case does not effect a taking in violation of the Fifth Amendment.[25]

Reversed.

THE CHIEF JUSTICE concurs in the judgment of the Court.

[25] Appellees also briefly argue that the regulations in this case interfere with their right to engage in a lawful occupation. Even if we were inclined to exhume this variant of the theory of substantive due process, it would not be applicable here. Appellees may still sell artifacts that do not consist in part of protected bird products.

Syllabus

P. C. PFEIFFER CO., INC., ET AL. *v.* FORD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–425. Argued March 20, 1979—Reargued October 1, 1979—Decided November 27, 1979

Section 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972, defines an employee as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." The question in this case is whether two workers were engaged in "maritime employment," as defined by § 2 (3), when they sustained injuries for which they sought compensation. Respondent Ford was injured on a public dock in the Port of Beaumont, Tex., while employed by petitioner P. C. Pfeiffer Co. and while fastening onto railroad flatcars military vehicles that had been delivered to the port by ship, stored, and then loaded the day before the accident onto the flatcars. Respondent Bryant, while working as a cotton header for petitioner Ayers Steamship Co. in the Port of Galveston, Tex., was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. Cotton arriving at the port from inland shippers enters storage in cotton compress-warehouses, then goes by dray wagon to pier warehouses, and later is moved by longshoremen from the warehouses onto ships. Both Ford's and Bryant's claims for coverage were denied by Administrative Law Judges applying the "point of rest" doctrine whereby maritime employment would include only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock and the portion of the loading process that takes place to the seaside of the last point of rest on the dock. The Benefits Review Board reversed both decisions, and the Court of Appeals affirmed. On remand for reconsideration in light of this Court's decision in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, which rejected the "point of rest" theory, the Court of Appeals reaffirmed its earlier opinion.

Held: Ford and Bryant were engaged in maritime employment at the time of their injuries because they were engaged in intermediate steps of moving cargo between ship and land transportation. Pp. 77–84.

(a) Petitioners' position that the Act covers only workers who are working or who may be assigned to work over the water itself is inconsistent with the language and structure of the Act, which contains dis-

tinct situs and status requirements. Section 3 (a) of the Act allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the water's edge, thus defining the broad geographic coverage of the Act, whereas § 2 (3) defines the Act's occupational requirements, referring to the nature of a worker's activities. The legislative history also shows that Congress intended the term "maritime employment" in § 2 (3) to refer to status rather than situs. In adopting an occupational test that focuses on loading and unloading, Congress anticipated that some persons who work only on land would receive benefits under the Act. Cf. *Northeast Marine Terminal Co.* v. *Caputo*, *supra*. Pp. 77–81.

(b) Ford and Bryant are the kind of land-based employees that Congress intended to encompass within the term "maritime employment." Both men engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation. Under § 2 (3), workers doing tasks traditionally performed by longshoremen are within the purview of the Act. The crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment, and a worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process. Pp. 81–84.

575 F. 2d 79, affirmed.

POWELL J., delivered the opinion for a unanimous Court.

E. D. Vickery reargued the cause for petitioners. With him on the briefs was *W. Robins Brice*.

Peter Buscemi reargued the cause for respondents, *pro hac vice*. *William C. Bryson* argued the cause for respondents on the original argument. With him on the brief for the federal respondent were *Solicitor General McCree*, *Laurie M. Streeter*, and *Joshua T. Gillelan II*. *Arthur L. Schechter* filed a brief for respondent Bryant.*

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*Briefs of *amici curiae* urging reversal were filed by *David R. Owen* and *Francis J. Gorman* for the Alliance of American Insurers et al.; and by *Thomas D. Wilcox* for the National Association of Stevedores.

Briefs of *amici curiae* urging affirmance were filed by *Thomas W. Gleason* and *Herzl S. Eisenstadt* for the International Longshoremen's Association,

MR. JUSTICE POWELL delivered the opinion of the Court.

The question in this case is whether two workers were engaged in "maritime employment," as defined by § 2 (3) of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1425, as amended, 86 Stat. 1251, 33 U. S. C. § 902 (3), when they sustained injuries for which they seek compensation.

I

On April 12, 1973, Diverson Ford accidentally struck the middle finger of his left hand with a hammer while working on a public dock in the Port of Beaumont, Tex. On the day of his injury, Ford was employed by the P. C. Pfeiffer Co. to fasten military vehicles onto railroad flatcars. The vehicles had been delivered to the port by ship a number of days before the accident, stored, and then loaded onto flatcars the day before. The flatcars would take the vehicles to their inland destination.

Ford was working out of the warehousemen's local on the day of the accident. Agreements between employers, the warehousemen's union, and the longshoremen's union limit the tasks that warehousemen may perform in the Port of Beaumont. Warehousemen may not move cargo directly from a vessel either to a point of rest in storage or to a railroad car. Nor may they move cargo from a shoreside point of rest directly onto a vessel. These jobs are reserved for longshoremen. App. 10–11.

On May 2, 1973, Will Bryant was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. Bryant was working as a cotton header for the Ayers Steamship Co. in the Port of Galveston, Tex. Cotton arrives at the port from inland shippers and enters storage in cotton

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AFL–CIO; and by *Norman Leonard* for the International Longshoremen's and Warehousemen's Union.

Dennis Lindsay and *Robert Babcock* filed a brief for Cargill, Inc., as *amicus curiae*.

compress-warehouses. The cotton then goes by dray wagon to pier warehouses where a driver and two cotton headers unload and store it. Longshoremen later move the cotton from the pier warehouses onto ships.

Contractual agreements between employers, the cotton headers' union, and the longshoremen's union distinguish the work that cotton headers may perform from the tasks assignable to longshoremen. Cotton headers may only load cotton off dray wagons into the pier warehouses or move cotton within a pier warehouse. Cargo moved directly from the ship to shoreside transportation, or directly from shoreside transportation to the ship, is handled solely by longshoremen. *Id.*, at 25, 48–49, 57–58, 60–61.

II

Before 1972, neither Ford nor Bryant could have received compensation under the Longshoremen's and Harbor Workers' Compensation Act because his injury occurred on land. The pre-1972 Act was simply an effort to fill the gap in workmen's compensation coverage created by this Court's decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), which held that state compensation systems could not reach longshoremen injured seaward of the water's edge.[1] A single situs requirement in § 3 (a) of the Act governed the scope of its coverage. That requirement limited coverage to workers whose "disability or death result[ed] from an injury occurring upon the navigable waters of the United States (including any dry dock). . . ." 44 Stat. 1426. In light of *Jensen* and the limited purpose of the Act, the situs test was understood to draw a sharp line between injuries sustained over water and those suffered on land. Thus, in

[1] A State, however, could compensate a worker who was injured while engaged in "maritime but local" activity. See *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U. S. 469, 476–477 (1922); *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 242 (1921). See generally G. Gilmore & C. Black, The Law of Admiralty § 6–49 (2d ed. 1975).

Nacirema Operating Co. v. *Johnson*, 396 U. S. 212, 218–220 (1969), this Court held that the Act did not extend to injuries occurring on a pier attached to the land. Although the Court recognized that inequities might result from rigid adherence to the *Jensen* line, the Court concluded that "[t]he invitation to move that line landward must be addressed to Congress, not to this Court." 396 U. S., at 224.[2]

Congress responded with the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (1972 Act).[3] The Act now extends coverage to more workers by replacing the single-situs requirement with a two-part situs and status standard. The newly broadened situs test provides compensation for an "employee" whose disability or death "results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." § 3 (a), 33 U. S. C. § 903 (a). The status test defines an employee as "any per-

[2] *Nacirema Operating Co.* v. *Johnson* denied compensation to three workers who attached cargo in railroad cars to ships' cranes for loading onto a vessel. When a loaded crane swung back toward land, the men were knocked onto a pier or crushed against a railroad car. A fourth case considered in the Court of Appeals along with the three cases consolidated in *Nacirema Operating Co.* vividly illustrated the arbitrariness of the *Jensen* line. The lower courts held that the Act covered a longshoreman who fell from his workplace on a pier into the water, where he drowned. See *Marine Stevedoring Corp.* v. *Oosting*, 238 F. Supp. 78 (ED Va. 1965), aff'd, 398 F. 2d 900 (CA4 1968) (en banc). The only difference between this longshoreman and the three workers in *Nacirema Operating Co.* was where his body fell. See *Nacirema Operating Co.* v. *Johnson*, 396 U. S., at 224–225 (Douglas, J., dissenting).

[3] 86 Stat. 1251. The primary purposes of the 1972 Amendments were to raise the amount of compensation available under the Act, to abolish the longshoremen's seaworthiness remedy against the owners of a vessel, and to outlaw shipowners' claims for indemnification from stevedores. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249, 261–262, and n. 18 (1977).

son engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." § 2 (3), 33 U. S. C. § 902 (3). To be eligible for compensation, a person must be an employee as defined by § 2 (3) who sustains injury on the situs defined by § 3 (a).

III

This Court first considered the scope of § 2 (3)'s status requirement in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S. 249 (1977). That case concerned the claims of two workers, Blundo and Caputo. Blundo was on a pier checking cargo as it was removed from a container when he suffered a fall.[4] Caputo sustained injury while rolling a loaded dolly into a consignee's truck.[5] We recognized that neither the 1972 Act nor its legislative history states explicitly whether workers like Blundo and Caputo, who handle cargo between sea and land transportation, are employees within the meaning of § 2 (3). The Court found, however, that consideration of the legislative history in light of the remedial purposes behind the expansion of coverage reveals a clear intent to cover such workers. 432 U. S., at 267–278.

One of the reasons Congress expanded coverage in 1972 was that containerization permits loading and unloading tasks traditionally conducted aboard ship to be performed on the land. Such tasks are "longshoring operations." *Id.*, at 270–271. Blundo's job of checking and marking goods as they

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[4] When a vessel carrying containers reaches port, the loaded containers are removed from the ship intact and moved overland. If a container holds cargo for more than one consignee, workers unload the goods for shipment inland. See *id.*, at 252–253, and n. 2.

[5] Caputo was working as a part of the traditional break-bulk cargo handling process in which each item of cargo is separately taken out of the hold of a vessel and moved ashore. *Id.*, at 255, 272.

were removed from a container was an integral part of the unloading process even though the container had been removed from a ship and trucked to a different pier before being emptied. Therefore, Blundo was an employee within the meaning of § 2 (3). 432 U. S., at 271.

Caputo, working as part of the traditional process of moving goods from ship to land transportation, was unaffected by the advent of containerization. But the Court recognized another congressional purpose relevant to the resolution of Caputo's claim. Congress wanted to ensure that a worker who could have been covered part of the time by the pre-1972 Act would be completely covered by the 1972 Act. By enlarging the covered situs and enacting the status requirement, Congress intended that a worker's eligibility for federal benefits would not depend on whether he was injured while walking down a gangway or while taking his first step onto the land. Congress therefore counted as "longshoremen" persons who spend "at least some of their time in indisputably longshoring operations." *Id.*, at 273. Caputo, who could have been assigned to loading containers and barges as well as trucks, was such a person. *Ibid.* Accordingly, the Court did not have to decide whether Caputo's work was "maritime employment" simply because he "engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck." *Id.*, at 272.

In holding that Blundo and Caputo were covered by the Act, *Northeast Marine Terminal* explicitly rejected the "point of rest" theory. Under that test, maritime employment would include only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock. For example, a worker who carried cargo directly from a ship to a warehouse or a truck would be engaged in maritime employment, but one who carried cargo from a warehouse to a truck would not. In loading operations, only workers employed to the seaside of the last point of rest would be covered.

We explained that application of the point-of-rest test would be inconsistent with congressional intent. First, the concept, although well known in the maritime industry, was not mentioned in the Act or its legislative history. Second, the standard excludes from coverage employees like Blundo whose work was shifted landward by the use of containers. Third, the test conflicts with the express purpose of the Act because it allows workers to walk in and out of coverage as their work moves to different sides of a point of rest. *Id.*, at 275–276. In sum, "[a] theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage [was] incapable of defeating our conclusion that Blundo and Caputo [were] 'employees.'" *Id.*, at 278–279.

Most of the litigation in the present case took place before our decision in *Northeast Marine Terminal*. At the initial administrative level, both Ford's and Bryant's claims for coverage were denied by Administrative Law Judges applying the point-of-rest doctrine. The Benefits Review Board reversed both decisions. The Court of Appeals for the Fifth Circuit affirmed. *Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F. 2d 533 (1976). The court rejected the point-of-rest theory, holding instead that the 1972 Act covers all workers directly involved in the work of loading, unloading, repairing, building, or breaking a vessel. *Id.*, at 539–540. The court found that "Ford's work of fastening the vehicles to the flat cars was . . . the last step in transferring this cargo from sea to land transportation," *id.*, at 543, and that Bryant's work "was an integral part of the ongoing process of moving cargo between land transportation and a ship," *id.*, at 544. Accordingly, the Court of Appeals concluded that both men were covered by the 1972 Act.

We granted certiorari, vacated, and remanded for reconsideration in light of *Northeast Marine Terminal*. 433 U. S. 904

(1977). On remand, the Fifth Circuit reaffirmed the reasoning of its earlier opinion. 575 F. 2d 79, 80 (1978) (*per curiam*). We again granted certiorari, 439 U. S. 978 (1978), and we now affirm.

IV

Petitioners urge that Ford and Bryant are not covered by the 1972 Act because they were not engaged in "maritime employment." [6] Petitioners suggest that a person is engaged in maritime employment only if, on the day of his injury, he could have been assigned to perform work upon the navigable waters of the United States. By navigable waters, the petitioners do not mean the broad situs defined in § 3 (a), as amended by the 1972 Act; rather they refer to places seaward of the *Jensen* line. In other words, petitioners argue that the 1972 Act covers only workers who are working or who may be assigned to work over the water itself. They say that this formulation follows congressional intent to cover all workers who, before 1972, could have walked in and out of coverage during any given day.[7]

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[6] Petitioners do not dispute that both accidents took place on the situs defined by § 3 (a), 33 U. S. C. § 903 (a), or that both men worked for statutory employers within the meaning of § 2 (4), 33 U. S. C. § 902 (4). Brief for Petitioners 7, n. 11, 28, n. 62.

[7] At oral argument, petitioners conceded that some workers who never set foot on a vessel are covered by § 2 (3). Petitioners acknowledged that a land-based longshoreman operating a crane that lifts goods from ship to dock is covered by the Act, although they argued that such a worker is not engaged in maritime employment. Tr. of Oral Arg. 10–11. Petitioners apparently assume that a person engaged in "longshoring operations" is not necessarily engaged in "maritime employment." See *id.*, at 14–16. But the language of § 2 (3) provides that an employee is "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker. . . ." 33 U. S. C. § 902 (3). The petitioners' argument supposes that the word "including" means "and" or "as well as." We understand the word "including" to indicate that "longshoring operations" are a part of the larger group

Petitioners' position is plainly inconsistent with the language and structure of the 1972 Act. The Act, as noted above, contains distinct situs and status requirements. The situs test of § 3 (a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the *Jensen* line. This test defines the broad geographic coverage of the Act. Section 2 (3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment." This section defines the Act's occupational requirements. The term "maritime employment" refers to the nature of a worker's activities. Thus, § 2 (3) uses the phrase "longshorem[e]n or other person[s] engaged in longshoring operations" as one example of workers who engage in maritime employment no matter where they do their job. Since § 3 (a) already limits the geographic coverage of the Act, § 2 (3) need not provide that longshoremen are covered only if they work in certain places. The use of the term "maritime employment" in § 2 (3), therefore, provides no support for the proposition that the statutory definition of an employee imports a geographic limitation narrower than the one defined in § 3 (a).[8]

The difficulty with petitioners' position becomes even plainer when their interpretation is applied to a single statutory provision that contains both the status and the situs requirement. Section 2 (4), 33 U. S. C. § 902 (4), defines an "employer" as one "any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States" as broadly defined by § 3 (a).

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of activities that make up "maritime employment." See Webster's New Collegiate Dictionary 581 (1973).

[8] In fact, the language of the situs requirement lends independent support to the conclusion that Congress focused on occupation rather than location. The covered situs includes specific areas adjoining navigable water or any "other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." § 3 (a), 33 U. S. C. § 903 (a). See also § 2 (4), 33 U. S. C. § 902 (4).

If the term "maritime employment" referred only to work that might take employees seaward of the *Jensen* line, then the broader situs test in the final clause of this section would become virtually superfluous. We decline the invitation to construe "maritime employment" so as to create two differing situs requirements in a single sentence. By understanding the term "maritime employment" to embody an occupational rather than a geographic concept, we give the two phases in § 2 (4) distinct and consistent meanings.

The discussion of coverage in the legislative history[9] also shows that Congress intended the term "maritime employment" to refer to status rather than situs. Committees in both Houses of Congress recognized:

> "[T]o take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only

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[9] The legislative history of § 2 (3) is not extensive. Committee Reports to both the House and the Senate contain identical language about the types of employees covered by the 1972 Act. See S. Rep. No. 92–1125, p. 13 (1972); H. R. Rep. No. 92–1441, pp. 10–11 (1972). The Senate Report also states that the 1972 Act "expands the coverage of this Act to cover injuries occurring in the contiguous dock area related to longshore and ship repair work." S. Rep. No. 92–1125, *supra*, at 2. Debate on the 1972 Act contributed little more than restatements of the Committee Reports and the statutory language. See, *e. g.*, 118 Cong. Rec. 36270–36271 (1972) (remarks of Sen. Williams); *id.*, at 36381–36382 (remarks of Rep. Daniels).

> to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." [10]

This legislative history discusses workers solely in terms of what they are doing and never in terms of where they are working.[11]

In adopting an occupational test that focuses on loading and unloading, Congress anticipated that some persons who work only on land would receive benefits under the 1972 Act. An obvious example of such a worker is Blundo. He was checking and marking cargo from a container that had been removed from a ship and moved overland to another pier before it was opened. Without any indication that he ever would be required to set foot on a ship, this Court held that he was covered by the 1972 Act because this type of work was maritime employment. *Northeast Marine Terminal Co.*, 432 U. S., at 271.

Land-based workers who do not handle containerized cargo also may be engaged in loading, unloading, repairing, or building a vessel. The Senate Subcommittee on Labor heard testimony that 30%–35% of ship repair work is done on land.[12]

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[10] S. Rep. No. 92–1125, *supra*, at 13; H. R. Rep. No. 92–1441, *supra*, at 11.

[11] Petitioners also cite two decisions for the proposition that pre-1972 case law defines maritime employment to include only work on the navigable waters. See *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334, 339–340 (1953); *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 133 (1930). Neither decision discusses what types of land-based loading or unloading operations might constitute maritime employment, probably because the situs requirement in the pre-1972 Act barred recovery for all injuries sustained on land. See *Nacirema Operating Co.* v. *Johnson*, 396 U. S. 212 (1969). In any event, the interpretation of the pre-1972 Act cannot obstruct Congress' obvious intent to include some land-based workers within the coverage of the current Act.

[12] Hearings on S. 2318 et al. before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess., 176 (1972) (testimony of Ralph Hartman, Bethlehem Steel Corp.). The

Furthermore, the usual longshoring crew includes some men whose duties may be carried out solely on the land. A typical loading gang consists of persons who move cargo from a warehouse to the side of a ship, frontmen who attach the load to the ship's gear for lifting aboard the vessel, and a hold gang which stores cargo inside the ship.[13] Although the workers who carry the cargo to shipside and the frontmen who attach the cargo to the lifting devices need not board a ship to carry out their duties, they are incontestably longshoremen directly engaged in the loading process. Even the petitioners concede that some land-based workers are covered by the 1972 Act.[14]

V

The issue in this case thus becomes whether Ford and Bryant are the kind of land-based employees that Congress intended to encompass within the term "maritime employment." Both men engaged in the type of duties that longshoremen perform in transferring goods between ship and land transportation. If the cotton that Bryant was unloading had been brought directly from the compress-warehouse to a

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same witness was asked if his company would favor extending federal benefits to all ship repairmen instead of continuing the pre-1972 practice of limiting federal compensation to ship repairmen who worked over the water. He stated that "we would interpose no objection . . . to extending the Longshoremen's Act to the land-based facility of the ship repair yard." *Id.*, at 177.

[13] P. Hartman, Collective Bargaining and Productivity 43–45 (1969); M. Norris, The Law of Maritime Personal Injuries § 3, p. 7 (3d ed. 1975); see U. S. Dept. of Labor, Manpower Utilization-Job Security in the Longshore Industry (Boston) 40–41 (1964); *id.* (Baltimore), at 32; *id.* (Houston-Galveston), at 45–46, 65–69; *id.* (Jacksonville-Charleston), at 38–40, 57–59; *id.* (Mobile), at 36–37; *id.* (New Orleans), at 35–36; *id.* (New York), at 21–24; *id.* (Philadelphia), at 37–38. A Committee of the House of Representatives found in 1922 that longshoremen may be "unloading a dray or a railroad car or moving articles from one point on the dock to another" as well as actually moving cargo on or off ship. H. R. Rep. No. 639, 67th Cong., 2d Sess., 2 (1922).

[14] See n. 7, *supra*.

ship, his task of moving cotton off a dray wagon would have been performed by a longshoreman.[15] Similarly, longshoremen—not warehousemen like Ford—would fasten military vehicles onto railroad flatcars if those vehicles went directly from a ship to the railroad cars.[16] The only basis for distinguishing Bryant or Ford from longshoremen who otherwise would perform the same work is the point-of-rest theory. That is, longshoremen in the Ports of Beaumont and Galveston would have performed the work done by Bryant and Ford had the cargo moved without interruption between land and sea transportation. Our unanimous opinion in *Northeast Marine Terminal* expressly decided that application of the point-of-rest test to define the scope of maritime employment would be contrary to congressional intent. *Id.*, at 275–279. Thus, there is no principled basis for distinguishing Ford and Bryant from longshoremen who have been injured while performing the same tasks.

We believe that § 2 (3)'s explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act. We do not suggest that the scope of maritime employment depends upon the vagaries of union jurisdiction. 432 U. S., at 268, n. 30. Instead, the crucial factor is the nature of the activity to which a worker may be assigned. Persons moving cargo directly from ship to land transportation are engaged in maritime employment. *Id.*, at 267, n. 28.[17] A worker responsible

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[15] *Supra*, at 72.

[16] *Supra*, at 71.

[17] As noted above, see *supra*, at 71–72, longshoremen in the Ports of Beaumont and Galveston handle all cargo that moves directly between ship and land transportation. That arrangement appears to reflect a general industry rule. See Hartman, *supra* n. 13, at 60; U. S. Dept. of Labor, Manpower Utilization-Job Security in the Longshore Industry (Baltimore) 31 (1964); *id.* (New Orleans), at 35; *id.* (Jacksonville), at 40.

for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process. We therefore hold that Ford and Bryant were engaged in maritime employment because they were engaged in intermediate steps of moving cargo between ship and land transportation.[18]

Our decision serves the intent of Congress in creating the status requirement. First, it focuses upon the nature, not the location, of employment. Second, it does not extend coverage to all workers in the situs area. There is no doubt for example, that neither the driver of the truck carrying cotton to Galveston nor the locomotive engineer transporting military vehicles from Beaumont was engaged in maritime employment even though he was working on the marine situs. Such a person's "responsibility is only to pick up stored cargo for further trans-shipment." S. Rep. No. 92–1125, p. 13 (1972); H. R. Rep. No. 92–1441, p. 11 (1972); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 267, 275, n. 37.

Our decision today also serves the broader congressional purpose of expanding coverage. Congress intended to apply a simple, uniform standard of coverage. Adoption of the petitioners' test would conflict with that goal, because any individual worker's coverage would depend upon the assignment policies of his employer. For example, a land-based worker would be covered if his employer allowed him to alternate assignments with co-workers who work on the water, but he would not be covered if the employer never allowed him to board a ship. Congress did not intend the Act's coverage to shift with the employer's whim. See *id.*, at 276, n. 38. In contrast, a defini-

[18] Congress was especially concerned that some workers might walk in and walk out of coverage. Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal Co.* v. *Caputo*, 432 U. S., at 273–274, that a worker is covered if he spends some of his time in indisputably longshoring operations and if, without the 1972 Act, he would be only partially covered.

tion of maritime employment that reaches any worker who moves cargo between ship and land transportation will enable both workers and employers to predict with reasonable assurance who on the situs is protected by the 1972 Act.

Because the Court of Appeals correctly determined that Ford and Bryant were engaged in maritime employment at the time of their injuries, its judgment is

Affirmed.

YBARRA *v.* ILLINOIS

APPEAL FROM THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

No. 78–5937. Argued October 9, 1979—Decided November 28, 1979

On the strength of a complaint for a search warrant based on an informant's statements that he had observed tinfoil packets on the person of a bartender and behind the bar at a certain tavern and that he had been advised by the bartender that the latter would have heroin for sale on a certain date, a judge of an Illinois state court issued a warrant authorizing the search of the tavern and the person of the bartender for "evidence of the offense of possession of a controlled substance." Upon entering the tavern to execute the warrant, police officers announced their purpose and advised those present that they were going to conduct a "cursory search for weapons." The officer who searched the customers felt what he described as "a cigarette pack with objects in it" in his first patdown of appellant, one of the customers. The officer did not then remove this pack from appellant's pocket but, after patting down other customers, returned to appellant, frisked him again, retrieved the cigarette pack from his pants pocket, and found inside it six tinfoil packets containing heroin. After appellant was indicted for unlawful possession of a controlled substance, he filed a pretrial motion to suppress the contraband seized from his person at the tavern. The trial court denied the motion, finding that the search had been conducted under the authority of an Illinois statute which empowers law enforcement officers executing a search warrant to detain and search any person found on the premises in order to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant. Appellant was convicted, and the Illinois Appellate Court affirmed, holding that the Illinois statute was not unconstitutional in its application to the facts of this case.

Held: The searches of appellant and the seizure of what was in his pocket contravened the Fourth and Fourteenth Amendments. Pp. 90–96.

(a) When the search warrant was issued the authorities had no probable cause to believe that any person found in the tavern, aside from the bartender, would be violating the law. The complaint for the warrant did not allege that the tavern was frequented by persons illegally purchasing drugs or that the informant had ever seen a patron of the tavern purchase drugs from the bartender or any other person.

And probable cause to search appellant was still absent when the police executed the warrant; upon entering the tavern, the police did not recognize appellant and had no reason to believe that he had committed, was committing, or was about to commit any offense. The police did possess a warrant based on probable cause to search the tavern where appellant happened to be when the warrant was executed, but a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron* v. *New York*, 392 U. S. 40, 62–63. Although the warrant gave the officers authority to search the premises and the bartender, it gave them no authority to invade the constitutional protections possessed individually by the tavern's customers. Pp. 90–92.

(b) Nor was the action of the police constitutionally permissible on the theory that the first search of appellant constituted a reasonable frisk for weapons under the doctrine of *Terry* v. *Ohio*, 392 U. S. 1, and yielded probable cause to believe that appellant was carrying narcotics, thus justifying the second search for which no warrant was required in light of the exigencies of the situation coupled with the ease with which appellant could have disposed of the illegal substance. A reasonable belief that a person is armed and presently dangerous must form the predicate to a patdown of the person for weapons. Here, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that appellant was armed and dangerous. Pp. 92–93.

(c) The Fourth and Fourteenth Amendments will not be construed to permit evidence searches of persons who, at the commencement of the search, are on "compact" premises subject to a search warrant, even where the police have a "reasonable belief" that such persons "are connected with" drug trafficking and "may be concealing or carrying away the contraband." Cf. *United States* v. *Di Re*, 332 U. S. 581. Pp. 94–96.

58 Ill. App. 3d 57, 373 N. E. 2d 1013, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, POWELL, and STEVENS, JJ., joined. BURGER, C. J., filed a dissenting opinion, in which BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 96. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN, J., joined, *post*, p. 98.

Alan D. Goldberg argued the cause *pro hac vice* for appellant. With him on the briefs were *Ralph Ruebner* and *Mary Robinson*.

Melbourne A. Noel, Jr., Assistant Attorney General of Illinois, argued the cause for appellee. With him on the brief were *William J. Scott*, Attorney General, and *Donald B. Mackay*, Assistant Attorney General.*

MR. JUSTICE STEWART delivered the opinion of the Court.

An Illinois statute authorizes law enforcement officers to detain and search any person found on premises being searched pursuant to a search warrant, to protect themselves from attack or to prevent the disposal or concealment of anything described in the warrant.[1] The question before us is whether the application of this statute to the facts of the present case violated the Fourth and Fourteenth Amendments.

I

On March 1, 1976, a special agent of the Illinois Bureau of Investigation presented a "Complaint for Search Warrant" to a judge of an Illinois Circuit Court. The complaint recited that the agent had spoken with an informant known to the police to be reliable and:

> "3. The informant related . . . that over the weekend of 28 and 29 February he was in the [Aurora Tap Tavern, located in the city of Aurora, Ill.] and observed fif-

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**Laurance S. Smith* filed a brief for the State Public Defender of California as *amicus curiae* urging reversal.

Fred E. Inbau, Wayne W. Schmidt, Frank G. Carrington, Jr., James P. Manak, Richard J. Brzeczek, Mike Greely, Attorney General of Montana, and *Marc F. Racicot*, Assistant Attorney General, filed a brief for Americans for Effective Law Enforcement, Inc., et al., as *amici curiae* urging affirmance.

[1] The statute in question is Ill. Rev. Stat., ch. 38, § 108–9 (1975), which provides in full:

"In the execution of the warrant the person executing the same may reasonably detain to search any person in the place at the time:

"(a) To protect himself from attack, or

"(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant."

teen to twenty-five tin-foil packets on the person of the bartender 'Greg' and behind the bar. He also has been in the tavern on at least ten other occasions and has observed tin-foil packets on 'Greg' and in a drawer behind the bar. The informant has used heroin in the past and knows that tin-foil packets are a common method of packaging heroin.

"4. The informant advised . . . that over the weekend of 28 and 29 February he had a conversation with 'Greg' and was advised that 'Greg' would have heroin for sale on Monday, March 1, 1976. This conversation took place in the tavern described."

On the strength of this complaint, the judge issued a warrant authorizing the search of "the following person or place: . . . [T]he Aurora Tap Tavern. . . . Also the person of 'Greg', the bartender, a male white with blondish hair appx. 25 years." The warrant authorized the police to search for "evidence of the offense of possession of a controlled substance," to wit, "[h]eroin, contraband, other controlled substances, money, instrumentalities and narcotics, paraphernalia used in the manufacture, processing and distribution of controlled substances."

In the late afternoon of that day, seven or eight officers proceeded to the tavern. Upon entering it, the officers announced their purpose and advised all those present that they were going to conduct a "cursory search for weapons." One of the officers then proceeded to pat down each of the 9 to 13 customers present in the tavern, while the remaining officers engaged in an extensive search of the premises.

The police officer who frisked the patrons found the appellant, Ventura Ybarra, in front of the bar standing by a pinball machine. In his first patdown of Ybarra, the officer felt what he described as "a cigarette pack with objects in it." He did not remove this pack from Ybarra's pocket. Instead, he moved on and proceeded to pat down other customers.

After completing this process the officer returned to Ybarra and frisked him once again. This second search of Ybarra took place approximately 2 to 10 minutes after the first. The officer relocated and retrieved the cigarette pack from Ybarra's pants pocket. Inside the pack he found six tinfoil packets containing a brown powdery substance which later turned out to be heroin.

Ybarra was subsequently indicted by an Illinois grand jury for the unlawful possession of a controlled substance. He filed a pretrial motion to suppress all the contraband that had been seized from his person at the Aurora Tap Tavern. At the hearing on this motion the State sought to justify the search by reference to the Illinois statute in question. The trial court denied the motion to suppress, finding that the search had been conducted under the authority of subsection (b) of the statute, to "prevent the disposal or concealment of [the] things particularly described in the warrant." The case proceeded to trial before the court sitting without a jury, and Ybarra was found guilty of the possession of heroin.

On appeal, the Illinois Appellate Court held that the Illinois statute was not unconstitutional "in its application to the facts" of this case. 58 Ill. App. 3d 57, 64, 373 N. E. 2d 1013, 1017. The court acknowledged that, had the warrant directed that a "large retail or commercial establishment" be searched, the statute could not constitutionally have been read to "authorize a 'blanket search' of persons or patrons found" therein. *Id.*, at 62, 373 N. E. 2d, at 1016. The court interpreted the statute as authorizing the search of persons found on premises described in a warrant only if there is "some showing of a connection with those premises, that the police officer reasonably suspected an attack, or that the person searched would destroy or conceal items described in the warrant." *Id.*, at 61, 373 N. E. 2d, at 1016. Accordingly, the State Appellate Court found that the search of Ybarra had been constitutional because it had been "conducted in a

one-room bar where it [was] obvious from the complaint . . . that heroin was being sold or dispensed," *id.*, at 62, 373 N. E. 2d, at 1016, because "the six packets of heroin . . . could easily [have been] concealed by the defendant and thus thwart the purpose of the warrant," *id.*, at 61, 373 N. E. 2d, at 1016, and because Ybarra was not an "innocent strange[r] having no connection with the premises," *ibid.* The court, therefore, affirmed Ybarra's conviction, and the Illinois Supreme Court denied his petition for leave to appeal. There followed an appeal to this Court, and we noted probable jurisdiction. 440 U. S. 790.

II

There is no reason to suppose that, when the search warrant was issued on March 1, 1976, the authorities had probable cause to believe that any person found on the premises of the Aurora Tap Tavern, aside from "Greg," would be violating the law.[2] The search warrant complaint did not allege that the bar was frequented by persons illegally purchasing drugs. It did not state that the informant had ever seen a patron of the tavern purchase drugs from "Greg" or from any other person. Nowhere, in fact, did the complaint even mention the patrons of the Aurora Tap Tavern.

Not only was probable cause to search Ybarra absent at the time the warrant was issued, it was still absent when the police executed the warrant. Upon entering the tavern, the

[2] The warrant issued on March 1, 1976, did not itself authorize the search of Ybarra or of any other patron found on the premises of the Aurora Tap Tavern. It directed the police to search "the following person or place: . . . the Aurora Tap Tavern. . . . Also the person of 'Greg'. . . ." Had the issuing judge intended that the warrant would or could authorize a search of every person found within the tavern, he would hardly have specifically authorized the search of "Greg" alone. "Greg" was an employee of the tavern, and the complaint upon which the search warrant was issued gave every indication that he would be present at the tavern on March 1.

police did not recognize Ybarra and had no reason to believe that he had committed, was committing, or was about to commit any offense under state or federal law. Ybarra made no gestures indicative of criminal conduct, made no movements that might suggest an attempt to conceal contraband, and said nothing of a suspicious nature to the police officers. In short, the agents knew nothing in particular about Ybarra, except that he was present, along with several other customers, in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale.

It is true that the police possessed a warrant based on probable cause to search the tavern in which Ybarra happened to be at the time the warrant was executed.[3] But, a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. *Sibron* v. *New York*, 392 U. S. 40, 62–63. Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. The Fourth and Fourteenth Amendments protect the "legitimate expectations of privacy" of persons, not places. See *Rakas* v. *Illinois*, 439 U. S. 128, 138–143, 148–149; *Katz* v. *United States*, 389 U. S. 347, 351–352.

Each patron who walked into the Aurora Tap Tavern on March 1, 1976, was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from

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[3] Ybarra concedes that the warrant issued on March 1, 1976, was supported by probable cause insofar as it purported to authorize a search of the premises of the Aurora Tap Tavern and a search of the person of "Greg," the bartender.

the Fourth and Fourteenth Amendment protection possessed by the proprietor of the tavern or by "Greg." Although the search warrant, issued upon probable cause, gave the officers authority to search the premises and to search "Greg," it gave them no authority whatever to invade the constitutional protections possessed individually by the tavern's customers.[4]

Notwithstanding the absence of probable cause to search Ybarra, the State argues that the action of the police in searching him and seizing what was found in his pocket was nonetheless constitutionally permissible. We are asked to find that the first patdown search of Ybarra constituted a reasonable frisk for weapons under the doctrine of *Terry* v. *Ohio*, 392 U. S. 1. If this finding is made, it is then possible to conclude, the State argues, that the second search of Ybarra was constitutionally justified. The argument is that the patdown yielded probable cause to believe that Ybarra was carrying narcotics, and that this probable cause constitutionally supported the second search, no warrant being required in light of the exigencies of the situation coupled with the ease with which Ybarra could have disposed of the illegal substance.

We are unable to take even the first step required by this argument. The initial frisk of Ybarra was simply not supported by a reasonable belief that he was armed and presently

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[4] The Fourth Amendment directs that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." Thus, "open-ended" or "general" warrants are constitutionally prohibited. See *Lo-Ji Sales, Inc.* v. *New York*, 442 U. S. 319; *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 311; *United States* v. *Chadwick*, 433 U. S. 1, 7–8; *Stanford* v. *Texas*, 379 U. S. 476, 480–482. It follows that a warrant to search a place cannot normally be construed to authorize a search of each individual in that place. The warrant for the Aurora Tap Tavern provided no basis for departing from this general rule. Consequently, we need not consider situations where the warrant itself authorizes the search of unnamed persons in a place and is supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs.

dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons.[5] *Adams* v. *Williams*, 407 U. S. 143, 146; *Terry* v. *Ohio*, *supra*, at 21–24, 27. When the police entered the Aurora Tap Tavern on March 1, 1976, the lighting was sufficient for them to observe the customers. Upon seeing Ybarra, they neither recognized him as a person with a criminal history nor had any particular reason to believe that he might be inclined to assault them. Moreover, as Police Agent Johnson later testified, Ybarra, whose hands were empty, gave no indication of possessing a weapon, made no gestures or other actions indicative of an intent to commit an assault, and acted generally in a manner that was not threatening. At the suppression hearing, the most Agent Johnson could point to was that Ybarra was wearing a ¾-length lumber jacket, clothing which the State admits could be expected on almost any tavern patron in Illinois in early March. In short, the State is unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Ybarra was armed and dangerous.

The *Terry* case created an exception to the requirement of probable cause, an exception whose "narrow scope" this Court "has been careful to maintain."[6] Under that doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. See, *e. g.*, *Adams* v. *Williams*, *supra* (at night, in high-crime district, lone police officer approached person believed by officer to possess gun and narcotics). Nothing in *Terry* can be understood to allow a generalized

[5] Since we conclude that the initial patdown of Ybarra was not justified under the Fourth and Fourteenth Amendments, we need not decide whether or not the presence on Ybarra's person of "a cigarette pack with objects in it" yielded probable cause to believe that Ybarra was carrying any illegal substance.

[6] *Dunaway* v. *New York*, 442 U. S. 200, 210.

"cursory search for weapons" or, indeed, any search whatever for anything but weapons. The "narrow scope" of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

What has been said largely disposes of the State's second and alternative argument in this case. Emphasizing the important governmental interest "in effectively controlling traffic in dangerous, hard drugs" and the ease with which the evidence of narcotics possession may be concealed or moved around from person to person, the State contends that the *Terry* "reasonable belief or suspicion" standard should be made applicable to aid the evidence-gathering function of the search warrant. More precisely, we are asked to construe the Fourth and Fourteenth Amendments to permit evidence searches of persons who, at the commencement of the search, are on "compact" premises subject to a search warrant, at least where the police have a "reasonable belief" that such persons "are connected with" drug trafficking and "may be concealing or carrying away the contraband."

Over 30 years ago, the Court rejected a similar argument in *United States* v. *Di Re*, 332 U. S. 581, 583–587. In that case, a federal investigator had been told by an informant that a transaction in counterfeit gasoline ration coupons was going to occur at a particular place. The investigator went to that location at the appointed time and saw the car of one of the suspected parties to the illegal transaction. The investigator went over to the car and observed a man in the driver's seat, another man (Di Re) in the passenger's seat, and the informant in the back. The informant told the investigator that the person in the driver's seat had given him counterfeit coupons. Thereupon, all three men were arrested and searched. Among the arguments unsuccessfully advanced by the Government to support the constitutionality of the search of Di Re was the contention that the investigator could

lawfully have searched the car, since he had reasonable cause to believe that it contained contraband, and correspondingly could have searched any occupant of the car because the contraband sought was of the sort "which could easily be concealed on the person." [7] Not deciding whether or not under the Fourth Amendment the car could have been searched, the Court held that it was "not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." [8]

The *Di Re* case does not, of course, completely control the case at hand. There the Government investigator was proceeding without a search warrant, and here the police possessed a warrant authorizing the search of the Aurora Tap Tavern. Moreover, in *Di Re* the Government conceded that its officers could not search all the persons in a house being searched pursuant to a search warrant.[9] The State makes no such concession in this case. Yet the governing principle in both cases is basically the same, and we follow that principle today. The "long-prevailing" constitutional standard of probable cause embodies " 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable inter-

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[7] 332 U. S., at 586.

[8] *Id.*, at 587.

[9] "The Government says it would not contend that, armed with a search warrant for a residence only, it could search all persons found in it. But an occupant of a house could be used to conceal this contraband on his person quite as readily as can an occupant of a car. Necessity, an argument advanced in support of this search, would seem as strong a reason for searching guests of a house for which a search warrant had issued as for search of guests in a car for which none had been issued. By a parity of reasoning with that on which the Government disclaims the right to search occupants of a house, we suppose the Government would not contend that if it had a valid search warrant for the car only it could search the occupants as an incident to its execution. How then could we say that the right to search a car without a warrant confers greater latitude to search occupants than a search by warrant would permit?" *Ibid.*

ferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.' " [10]

For these reasons, we conclude that the searches of Ybarra and the seizure of what was in his pocket contravened the Fourth and Fourteenth Amendments.[11] Accordingly, the judgment is reversed, and the case is remanded to the Appellate Court of Illinois, Second District, for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST join, dissenting.

I join MR. JUSTICE REHNQUIST's dissent since I cannot subscribe to the Court's unjustifiable narrowing of the rule of

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[10] *Dunaway* v. *New York*, 442 U. S., at 208, quoting *Brinegar* v. *United States*, 338 U. S. 160, 176.

The circumstances of this case do not remotely approach those in which the Court has said that a search may be made on less than probable cause. In addition to *Terry* v. *Ohio*, 392 U. S. 1, see, *e. g.*, *Delaware* v. *Prouse*, 440 U. S. 648; *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307; *United States* v. *Martinez-Fuerte*, 428 U. S. 543; *South Dakota* v. *Opperman*, 428 U. S. 364; *United States* v. *Brignoni-Ponce*, 422 U. S. 873; *United States* v. *Biswell*, 406 U. S. 311; *Camara* v. *Municipal Court*, 387 U. S. 523.

[11] Our decision last Term in *Michigan* v. *DeFillippo*, 443 U. S. 31, does not point in a different direction. There we held that the Fourth and Fourteenth Amendments had not been violated by an arrest based on a police officer's probable cause to believe that the suspect had committed or was committing a substantive criminal offense, even though the statute creating the offense was subsequently declared unconstitutional. Here, the police officers acted on the strength of Ill. Rev. Stat., ch. 38, § 108–9 (1975), but that statute does not define the elements of a substantive criminal offense under state law. The statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause and without search warrants. This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches. See, *e. g.*, *Torres* v. *Puerto Rico*, 442 U. S. 465; *Almeida-Sanchez* v. *United States*, 413 U. S. 266; *Sibron* v. *New York*, 392 U. S. 40; *Berger* v. *New York*, 388 U. S. 41.

Terry v. *Ohio*, 392 U. S. 1 (1968). The Court would require a particularized and individualized suspicion that a person is armed and dangerous as a condition to a *Terry* search. This goes beyond the rationale of *Terry* and overlooks the practicalities of a situation which no doubt often confronts officers executing a valid search warrant. The Court's holding is but another manifestation of the practical poverty of the judge-made exclusionary rule. "The suppression of truth is a grievous necessity at best, more especially when as here the inquiry concerns the public interest; it can be justified at all only when the opposed private interest is supreme." *McMann* v. *SEC*, 87 F. 2d 377, 378 (CA2 1937) (L. Hand, J.). Here, the Court's holding operates as but a further hindrance on the already difficult effort to police the narcotics traffic which takes such a terrible toll on human beings.

These officers had validly obtained a warrant to search a named person and a rather small, one-room tavern for narcotics. Upon arrival, they found the room occupied by 12 persons. Were they to ignore these individuals and assume that all were unarmed and uninvolved? Given the setting and the reputation of those who trade in narcotics, it does not go too far to suggest that they might pay for such an easy assumption with their lives. The law does not require that those executing a search warrant must be so foolhardy. That is precisely what Mr. Chief Justice Warren's opinion in *Terry* stands for. Indeed, the *Terry* Court recognized that a balance must be struck between the privacy interest of individuals and the safety of police officers in performing their duty. I would hold that when police execute a search warrant for narcotics in a place of known narcotics activity they may protect themselves by conducting a *Terry* search. They are not required to assume that they will not be harmed by patrons of the kind of establishment shown here, something quite different from a ballroom at the Waldorf. "The officer need not be absolutely certain that the individual is armed; the issue is

whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry* v. *Ohio*, *supra*, at 27.

I do not find it controlling that the heroin was not actually retrieved from appellant until the officer returned after completing the first search. The "cigarette pack with objects in it" was noticed in the first search. In the "second search," the officer did no more than return to the appellant and retrieve the pack he had already discovered. That there was a delay of minutes between the search and the seizure is not dispositive in this context, where the searching officer made the on-the-spot judgment that he need not seize the suspicious package immediately. He could first reasonably make sure that none of the patrons was armed before returning to appellant. Thus I would treat the second search and its fruits just as I would had the officer taken the pack immediately upon noticing it, which plainly would have been permissible.

Under this analysis, I need not reach the validity of the Illinois statute under which the Illinois court sustained the search. Parenthetically, I find the Court's failure to pass on the Illinois statute puzzling in light of the Court's holding that the searches were not authorized by *Terry*.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

On March 1, 1976, agents of the Illinois Bureau of Investigation executed a search warrant in the Aurora Tap Tavern in Aurora, Ill. The warrant was based on information given by a confidential informant who said that he had seen heroin on the person of the bartender and in a drawer behind the bar on at least 10 occasions. Moreover, the informant advised the affiant that the bartender would have heroin for sale on March 1. The warrant empowered the police to search the Aurora Tap and the person of "Greg," the bartender.

When police arrived at the Aurora Tap, a drab, dimly lit tavern, they found about a dozen or so persons standing or

sitting at the bar. The police announced their purpose and told everyone at the bar to stand for a patdown search. Agent Jerome Johnson, the only officer to testify in the proceedings below, explained that the initial search was a frisk for weapons to protect the officers executing the warrant. Johnson frisked several patrons, including appellant Ybarra. During this patdown, Johnson felt "a cigarette pack with objects in it" in Ybarra's front pants pocket. He finished frisking the other patrons and then returned to Ybarra. At that time, he frisked Ybarra once again, reached into Ybarra's pocket, and removed the cigarette package that he had felt previously. The package, upon inspection, confirmed the officer's previously aroused suspicion that it contained not cigarettes but packets of heroin.

Confronted with these facts, the Court concludes that the police were without authority under the warrant to search any of the patrons in the tavern and that, absent probable cause to believe that Ybarra possessed contraband, the search of his person violated the Fourth and Fourteenth Amendments. Because I believe that this analysis is faulty, I dissent.

The first question posed by this case is the proper scope of a policeman's power to search pursuant to a valid warrant. This Court has had very few opportunities to consider the scope of such searches. An early case, *Marron* v. *United States*, 275 U. S. 192 (1927), held that police could not seize one thing under a search warrant describing another thing. See also *Steele* v. *United States*, 267 U. S. 498 (1925) (warrant authorizing search of building used as a garage empowers police to search connecting rooms). Three other cases, *Berger* v. *New York*, 388 U. S. 41 (1967); *United States* v. *Kahn*, 415 U. S. 143 (1974); and *United States* v. *Donovan*, 429 U. S. 413 (1977), examined the scope of a warrant in the context of electronic surveillance. A number of cases involving warrantless searches have offered dicta on the subject of searches pursuant to a warrant. See, *e. g.*, *Bivens* v. *Six*

Unknown Fed. Narcotics Agents, 403 U. S. 388, 394, n. 7 (1971) (Fourth Amendment confines officer executing a warrant "strictly within the bounds set by the warrant"). Closest for our purposes, though concededly not dispositive, is *United States* v. *Di Re*, 332 U. S. 581, 587 (1948), a case involving the warrantless search of an occupant of an automobile. In that case the Court suggested that police, "armed with a search warrant for a residence only," could not search "all persons found" in the residence.

Faced with such a dearth of authority, it makes more sense than ever to begin with the language of the Fourth Amendment itself:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

As often noted, the Amendment consists of two independent clauses joined by the conjunction "and." See, *e. g.*, *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356–357 (1931). The first clause forbids "unreasonable searches and seizures" of "persons, houses, papers, and effects. . . . " The second clause describes the circumstances under which a search warrant or arrest warrant may issue, requiring specification of the place to be searched as well as the persons or things to be seized.

Much of the modern debate over the meaning of the Fourth Amendment has focused on the relationship between the reasonableness requirement and the warrant requirement. In particular, the central question has been whether and under what circumstances the police are entitled to conduct "reasonable" searches without first securing a warrant. As this Court has summarized:

> "Some have argued that a determination by a magistrate of probable cause as a precondition of any search or

> seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. Others have argued with equal force that a test of reasonableness, applied after the fact of search or seizure when the police attempt to introduce the fruits in evidence, affords ample safeguard for the rights in question, so that '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.'" *Coolidge* v. *New Hampshire*, 403 U. S. 443, 474 (1971), quoting *United States* v. *Rabinowitz*, 339 U. S. 56, 66 (1950).

MR. JUSTICE STEWART explained the current accommodation of the two clauses in *Katz* v. *United States*, 389 U. S. 347, 357 (1967): "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." See also *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 219 (1973).

Here, however, we must look to the language of the Fourth Amendment to answer a wholly different question: whether and under what circumstances the police may search a person present at the place named in a warrant. In this regard, the second clause of the Amendment, by itself, offers no guidance. It is merely a set of standards that must be met before a search warrant or arrest warrant may "issue." The restrictions on a policeman's authority to search pursuant to a warrant derive, of course, from the first clause of the Amendment, which prohibits all "unreasonable" searches, whether those searches are pursuant to a warrant or not. See *Go-Bart Co.* v. *United States*, *supra*, at 357. Reading the two clauses together, we can infer that some searches or seizures are *per se* unreasonable: searches extending beyond the place specified, cf. *Steele* v. *United States*, *supra*, or seizures of

persons or things other than those specified. Cf. *Marron* v. *United States*, 275 U. S. 192 (1927). No such presumption is available to Ybarra here, however, because the second clause of the Amendment does not require the warrant to specify the "persons" to be searched.[1] As this Court has noted in the context of electronic surveillance, " '[t]he Fourth Amendment requires a warrant to describe only "the place to be searched, and the persons or things to be seized," not the persons from whom things will be seized.' " *United States* v. *Kahn*, 415 U. S., at 155, n. 15, quoting *United States* v. *Fiorella*, 468 F. 2d 688, 691 (CA2 1972).[2]

Nor, as a practical matter, could we require the police to specify in advance all persons that they were going to search at the time they execute the warrant. A search warrant is, by definition, an anticipatory authorization. The police must offer the magistrate sufficient information to confine the search but must leave themselves enough flexibility to react reasonably to whatever situation confronts them when they enter the premises. An absolute bar to searching persons not named in the warrant would often allow a person to frustrate the search simply by placing the contraband in his pocket. I cannot subscribe to any interpretation of the Fourth Amendment that would support such a result, and I doubt that this Court would sanction it if that precise fact situation were before it.

Recognizing that the authority to search premises must, under some circumstances, include the authority to search

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[1] Technically, the police must temporarily "seize" a person before they can search him. Such incidental seizures, however, never have been nor could be subjected to the warrant requirement. See *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). See also *infra*, at 104–105.

[2] The failure of the Fourth Amendment to require specification of the persons to be searched does not, of course, prohibit such specification. Thus, in the present case, the warrant specifically authorized the police to search Greg, the bartender.

persons present on those premises,[3] courts and legislatures have struggled to define the precise contours of that power. Some courts, for example, have required an indication that the person searched had a "connection" with the premises. See, *e. g.*, *Purkey* v. *Maby*, 33 Idaho 281, 193 P. 79 (1920); *State* v. *Massie*, 95 W. Va. 233, 120 S. E. 514 (1923). These courts do not explain, however, what form that connection must take or how it might manifest itself to the police. Some States have relied on the Uniform Arrest Act, which allows police executing a warrant to detain and question a suspicious person for up to two hours. See, *e. g.*, *State* v. *Wise*, 284 A. 2d 292 (Del. Super. 1971). Proponents of this approach fail to explain, however, how detention for questioning will produce any hidden contraband. Moreover, in light of the Fourth Amendment's requirement that the warrant specify the person to be "seized," it is at least arguable that this approach substitutes a greater constitutional intrusion for a lesser. Several other States, Illinois included, have simply passed over the constitutional question by identifying the permissible purposes for a search without specifying the circumstances under which that search can be conducted. Illinois' provision, for example, permits an officer to search persons present on the named premises

> "(a) To protect himself from attack, or
>
> "(b) To prevent the disposal or concealment of any instruments, articles or things particularly described in the warrant." Ill. Rev. Stat., ch. 38, § 108–9 (1975).

The generality of these attempts to define the proper limits of such searches does not mean, of course, that no limits exist.

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[3] As even a critic of the approach employed by the court below admitted, "a realistic appraisal of the situation facing the officer executing a search warrant compels the conclusion that *under some circumstances* a right to search occupants of the place named in the warrant is essential." LaFave, Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth," 1966 Law Forum 255, 272.

A person does not forfeit the protection of the Fourth Amendment merely because he happens to be present during the execution of a search warrant. To define those limits, however, this Court need look no further than the first clause of that Amendment and need ask no question other than whether, under all the circumstances, the actions of the police in executing the warrant were reasonable. Significantly, the concept of reasonableness in this context is different from the prevailing concept of reasonableness in the context of warrantless searches. In that latter context, as noted earlier, there is a tension between giving full scope to the authority of police to make reasonable searches and the inferred requirement that the police secure a judicial approval in advance of a search. In the past we have resolved that tension by allowing "jealously and carefully drawn" exceptions to the warrant requirement. See *Jones* v. *United States*, 357 U. S. 493, 499 (1958); *Katz* v. *United States*, 389 U. S., at 357. The rationale for drawing these exceptions closely is obvious. Loosely drawn, they could swallow the warrant requirement itself.

In this case, however, the warrant requirement has been fully satisfied. As a result, in judging the reasonableness of the search pursuant to the warrant, we need not measure it against jealously drawn exceptions to that requirement. Only once before, to my knowledge, has this Court been relieved of concern for the warrant requirement to the extent that we could give full scope to the notion of reasonableness. In *Terry* v. *Ohio*, 392 U. S. 1 (1968), this Court considered the applicability of the Fourth Amendment to an on-the-street encounter between a policeman and three men who had aroused his suspicions. In upholding the ensuing "stop and frisk," this Court found the warrant requirement completely inapposite because "on-the-spot" interactions between police and citizens "historically [have] not been, and as a practical matter could not be, subjected to the warrant procedure." *Id.*, at 20. The conduct in question had to be judged solely

under "the Fourth Amendment's general proscription against unreasonable searches and seizures." *Ibid.*

The petitioner in *Terry* had sought a "rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment," a model allowing the police to search some individuals completely and other individuals not at all. Such a model, however, would have overlooked "the utility of limitations upon the scope, as well as the initiation, of police actions as a means of constitutional regulation." *Id.*, at 17. This Court, therefore, opted for a flexible model balancing the scope of the intrusion against its justification:

> "In order to assess the reasonableness of [the challenged search] as a general proposition, it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Id.*, at 20–21, quoting *Camara* v. *Municipal Court*, 387 U. S. 523, 534–535, 536–537 (1967).

In the present case, Ybarra would have us eschew such flexibility in favor of a rule allowing the police to search only those persons on the premises for whom the police have probable cause to believe that they possess contraband. Presumably, such a belief would entitle the police to search those persons completely. But such a rule not only reintroduces the rigidity condemned in *Terry*, it also renders the existence of the search warrant irrelevant. Given probable cause to believe that a person possesses illegal drugs, the police need no warrant to conduct a full body search. They need only arrest that person and conduct the search incident to that arrest. See *Chimel* v. *California*, 395 U. S. 752, 763 (1969). It should not matter, of course, whether the arrest precedes the search or vice versa. See, *e. g.*, *United States* v. *Gorman*, 355

F. 2d 151, 159 (CA2 1965), cert. denied, 384 U. S. 1024 (1966); *Holt* v. *Simpson*, 340 F. 2d 853, 856 (CA7 1965).

As already noted, I believe it error to analyze this case as if the police were under an obligation to act within one of the narrow exceptions to the warrant requirement, yet this is precisely what Ybarra would have us do. Whereas in *Terry* the warrant requirement was inapposite, here the warrant requirement has been fully satisfied. In either case we should give full scope to the reasonableness requirement of the first clause of the Fourth Amendment. Thus, in judging the reasonableness of a search pursuant to a warrant, which search extends to persons present on the named premises, this Court should consider the scope of the intrusion as well as its justification.

Viewed sequentially, the actions of the police in this case satisfy the scope/justification test of reasonableness established by the first clause of the Fourth Amendment as interpreted in *Terry*. The police entered the Aurora Tap pursuant to the warrant and found themselves confronting a dozen people, all standing or sitting at the bar, the suspected location of the contraband. Because the police were aware that heroin was being offered for sale in the tavern, it was quite reasonable to assume that any one or more of the persons at the bar could have been involved in drug trafficking. This assumption, by itself, might not have justified a full-scale search of all the individuals in the tavern. Nevertheless, the police also were quite conscious of the possibility that one or more of the patrons could be armed in preparation for just such an intrusion. In the narcotics business, "firearms are as much 'tools of the trade' as are most commonly recognized articles of narcotics paraphernalia." *United States* v. *Oates*, 560 F. 2d 45, 62 (CA2 1977). The potential danger to the police executing the warrant and to innocent individuals in this dimly lit tavern cannot be minimized. By conducting an immediate frisk of those persons at the bar, the police elimi-

nated this danger and "froze" the area in preparation for the search of the premises.

Ybarra contends that *Terry* requires an "individualized" suspicion that a particular person is armed and dangerous. While this factor may be important in the case of an on-the-street stop, where the officer must articulate some reason for singling the person out of the general population, there are at least two reasons why it has less significance in the present situation, where execution of a valid warrant had thrust the police into a confrontation with a small, but potentially dangerous, group of people. First, in place of the requirement of "individualized suspicion" as a guard against arbitrary exercise of authority, we have here the determination of a neutral and detached magistrate that a search was necessary. As this Court noted in *Fisher* v. *United States*, 425 U. S. 391, 400 (1976), the Framers of the Fourth Amendment "struck a balance so that when the State's reason to believe incriminating evidence will be found becomes sufficiently great, the invasion of privacy becomes justified and a warrant to search and seize will issue." The question then becomes whether, given the initial decision to intrude, the scope of the intrusion is reasonable.

In addition, the task performed by the officers executing a search warrant is inherently more perilous than is a momentary encounter on the street. The danger is greater "not only because the suspect and officer will be in close proximity for a longer period of time, but also . . . because the officer's investigative responsibilities under the warrant require him to direct his attention to the premises rather than the person." W. LaFave, Search and Seizure § 4.9, pp. 150–151 (1978). To hold a police officer in such a situation to the same standard of "individualized suspicion" as might be required in the case of an on-the-street stop would defeat the purpose of gauging reasonableness in terms of all the circumstances surrounding an encounter.

Terry suggests an additional factor that courts must consider when confronting an allegedly illegal frisk for weapons. As this Court admitted in that case, "[t]he exclusionary rule has its limitations . . . as a tool of judicial control." 392 U. S., at 13. Premised as that rule is on the hypothesis that police will avoid illegal searches if threatened with exclusion of the fruits of such searches, "it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal." *Id.*, at 14. Where, as here, a preliminary frisk is based on an officer's well-honed sense of self-preservation, I have little doubt that "the [exclusionary] rule is ineffective as a deterrent." *Id.*, at 13.

Measured against the purpose for the initial search is the scope of that search. I do not doubt that a patdown for weapons is a substantial intrusion into one's privacy. See *Terry* v. *Ohio*, 392 U. S., at 17, n. 13. Nevertheless, such an intrusion was more than justified, under the circumstances here, by the potential threat to the lives of the searching officers and innocent bystanders. In the rubric of *Terry* itself, a "man of reasonable caution" would have been warranted in the belief that it was appropriate to frisk the 12 or so persons in the vicinity of the bar for weapons. See *id.*, at 21–22. Thus, the initial frisk of Ybarra was legitimate.

During this initial patdown, Officer Johnson felt something suspicious: a cigarette package with objects in it. The record below is not entirely clear as to the shape or texture of the objects, but it is clear that Officer Johnson had at least a subjective suspicion that the objects were packets of heroin like those described in the warrant. He testified, for example, that after patting down the other persons at the bar, he returned directly to Ybarra to search him "for controlled substances." App. 49. At this point, he reached into Ybarra's pants pocket, removed the cigarette package, and confirmed his suspicion.

While the test of reasonableness under the Fourth Amendment is necessarily objective as opposed to subjective, see *Terry* v. *Ohio, supra,* at 21–22, Officer Johnson's subjective suspicions help fill out his cryptic description of the "objects" that he felt in Ybarra's pocket. The objects clearly did not feel like cigarettes.[4] In this case we need not decide whether, as a general rule, an officer conducting an on-the-street frisk under *Terry* can carry his search into the pockets of a suspect to examine material that he suspects to be contraband. We are dealing here with a case where the police had obtained a warrant to search for precisely the item that Officer Johnson suspected was present in Ybarra's pocket. Whether Officer Johnson's level of certainty could be labeled "probable cause," "reasonable suspicion," or some indeterminate, intermediate level of cognition, the limited pursuit of his suspicions by extracting the item from Ybarra's pocket was reasonable. The justification for the intrusion was linked closely to the terms of the search warrant; the intrusion itself was carefully tailored to conform to its justification.

The courts below reached a similar conclusion. The trial court noted correctly that "[i]t might well not be reasonable to search 350 people on the first floor of Marshall Field, but we're talking about, by description, a rather small tavern." See App. 43. The question, as understood by the trial court, was the "reasonableness" of the intrusion under all the surrounding circumstances. *Ibid.* The Illinois Appellate Court agreed. In an earlier case, *People* v. *Pugh,* 69 Ill. App. 2d 312, 217 N. E. 2d 557 (1966), the Appellate Court had concluded that the police acted reasonably in searching the brother of the owner of the named premises during the exe-

[4] In fact, Officer Johnson did testify that the objects felt exactly like what they were: heroin. See App. 9 ("I felt some objects that I felt to be heroin"). See also *id.,* at 50 ("I felt objects in his pocket which I believed—"). In both cases defense counsel interposed objections to Officer Johnson's characterization of the objects, which objections the trial court sustained.

cution of a search warrant for narcotics. According to the Appellate Court in that case, "[t]he United States Constitution prohibits unreasonable searches . . . ; the search of Raymond Pugh under the circumstances of this case cannot be so classified." *Id.*, at 316, 217 N. E. 2d, at 559. In this case, the Appellate Court relied expressly on the holding and reasoning in *Pugh* and found no constitutional violation in the searches of Ybarra. These findings should not be overturned lightly.

I would conclude that Officer Johnson, acting under the authority of a valid search warrant, did not exceed the reasonable scope of that warrant in locating and retrieving the heroin secreted in Ybarra's pocket. This is not a case where Ybarra's Fourth Amendment rights were at the mercy of overly zealous officers "engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States*, 333 U. S. 10, 13–14 (1948). On the contrary, the need for a search was determined, as contemplated by the second clause of the Fourth Amendment, by a neutral and detached magistrate, and the officers performed their duties pursuant to their warrant in an appropriate fashion. The Fourth Amendment requires nothing more.

UNITED STATES v. KUBRICK

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 78–1014. Argued October 3, 1979—Decided November 28, 1979

A provision of the Federal Tort Claims Act (FTCA), 28 U. S. C. § 2401 (b), bars any tort claim against the United States unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." In 1968, several weeks after having an infected leg treated with neomycin (an antibiotic) at a Veterans' Administration (VA) hospital, respondent suffered a hearing loss, and in January 1969 was informed by a private physician that it was highly possible that the hearing loss was the result of the neomycin treatment. Subsequently, in the course of respondent's unsuccessful administrative appeal from the VA's denial of his claim for certain veterans' benefits based on the allegation that the neomycin treatment had caused his deafness, another private physician in June 1971 told respondent that the neomycin had caused his injury and should not have been administered. In 1972, respondent filed suit under the FTCA, alleging that he had been injured by negligent treatment at the VA hospital. The District Court rendered judgment for respondent, rejecting the Government's defense that respondent's claim was barred by the 2-year statute of limitations because it had accrued in January 1969, when respondent first learned that his hearing loss had probably resulted from the neomycin, and holding that respondent had no reason to suspect negligence until his conversation with the second physician in June 1971, less than two years before the action was commenced. The Court of Appeals affirmed, holding that if a medical malpractice claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused the injury was legally blameworthy, and that here the limitations period was not triggered until the second physician indicated in June 1971 that the neomycin treatment had been improper.

Held: A claim accrues within the meaning of § 2401 (b) when the plaintiff knows both the existence and the cause of his injury, and not at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice. Hence, respondent's claim accrued in

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January 1969 when he was aware of his injury and its probable cause, and thus was barred by the 2-year statute of limitations. Pp. 117–125.

(a) Section 2401 (b) is the balance struck by Congress in the context of tort claims against the Government, and should not be construed so as to defeat its purpose of encouraging the prompt presentation of claims. Moreover, § 2401 (b), being a condition of the FTCA's waiver of the United States' immunity from suit, should not be construed to extend such waiver beyond that which Congress intended. Pp. 117–118.

(b) There is nothing in the FTCA's language or legislative history that provides a substantial basis for the Court of Appeals' construction of § 2401 (b). Nor did the prevailing case law at the time the FTCA was passed lend support to the notion that tort claims in general or malpractice claims in particular do not accrue until a plaintiff learns that his injury was negligently inflicted. Pp. 119–120.

(c) For statute of limitations purposes, a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should not receive equal treatment. P. 122.

(d) A plaintiff such as respondent, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community, and to excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute. Whether or not he is competently advised, or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort plaintiffs must make. Pp. 123–124.

581 F. 2d 1092, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 125.

Elinor Hadley Stillman argued the cause for the United States. With her on the brief were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook,* and *William Kanter.*

Benjamin Kuby argued the cause for respondent. With him on the brief were *Paul N. Minkoff* and *Joan Saltzman.*

Mr. JUSTICE WHITE delivered the opinion of the Court.

Under the Federal Tort Claims Act (Act),[1] 28 U. S. C. § 2401 (b), a tort claim against the United States is barred unless it is presented in writing to the appropriate federal agency "within two years after such claim accrues." The issue in this case is whether the claim "accrues" within the meaning of the Act when the plaintiff knows both the existence and the cause of his injury or at a later time when he also knows that the acts inflicting the injury may constitute medical malpractice.

I

Respondent Kubrick, a veteran, was admitted to the Veterans' Administration (VA) hospital in Wilkes-Barre, Pa., in April 1968, for treatment of an infection of the right femur. Following surgery, the infected area was irrigated with neomycin, an antibiotic, until the infection cleared. Approximately six weeks after discharge, Kubrick noticed

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[1] Title 28 U. S. C. § 2674 provides in part:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Title 28 U. S. C. § 1346 (b) provides that the district courts "shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Title 28 U. S. C. § 2401 (b), the limitations provision applicable to tort claims against the United States, provides:

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

a ringing sensation in his ears and some loss of hearing. An ear specialist in Scranton, Pa., Dr. Soma, diagnosed the condition as bilateral nerve deafness. His diagnosis was confirmed by other specialists. One of them, Dr. Sataloff, secured Kubrick's VA hospital records and in January 1969, informed Kubrick that it was highly possible that the hearing loss was the result of the neomycin treatment administered at the hospital. Kubrick, who was already receiving disability benefits for a service-connected back injury, filed an application for an increase in benefits pursuant to 38 U. S. C. § 351,[2] alleging that the neomycin treatment had caused his deafness. The VA denied the claim in September 1969, and on resubmission again denied the claim, on the grounds that no causal relationship existed between the neomycin treatment and the hearing loss and that there was no evidence of "carelessness, accident, negligence, lack of proper skill, error in judgment or other fault on the part of the Government."

In the course of pursuing his administrative appeal, Kubrick was informed by the VA that Dr. Soma had suggested a connection between Kubrick's loss of hearing and his prior occupation as a machinist. When questioned by Kubrick on June 2, 1971, Dr. Soma not only denied making the statement attributed to him but also told respondent that the neomycin had caused his injury and should not have been administered. On Dr. Sataloff's advice, respondent then consulted an attorney and employed him to help with his appeal. In rendering its decision in August 1972, the VA Board of

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[2] Title 38 U. S. C. § 351 provides that a veteran who suffers "an injury, or an aggravation of an injury, as the result of hospitalization, medical or surgical treatment" administered by the VA shall be awarded disability benefits "in the same manner as if such disability . . . were service-connected." The regulations require the applicant for benefits to show that "the disability proximately resulted through carelessness, accident, negligence, lack of proper skill, error in judgement, or similar instances of indicated fault on the part of the Veterans Administration." 38 CFR § 3.358 (c)(3) (1978).

Appeals recognized that Kubrick's hearing loss "may have been caused by the neomycin irrigation" but rejected the appeal on the ground that the treatment was in accordance with acceptable medical practices and procedures and that the Government was therefore faultless.[3]

Kubrick then filed suit under the Act, alleging that he had been injured by negligent treatment in the VA hospital.[4] After trial, the District Court rendered judgment for Kubrick, rejecting, among other defenses, the assertion by the United States that Kubrick's claim was barred by the 2-year statute of limitations because the claim had accrued in January 1969, when he learned from Dr. Sataloff that his hearing loss had probably resulted from the neomycin. The District Court conceded that the lower federal courts had held with considerable uniformity that a claim accrues within the meaning of the Act when "the claimant has discovered, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged malpractice," 435 F. Supp. 166, 180 (ED Pa. 1977), and that notice of the injury and its cause normally were sufficient to trigger the limitations period.

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[3] In 1975, upon reconsideration of its decision, the VA Board of Appeals not only found, as it had before, that Kubrick's hearing loss may have been caused by neomycin irrigation but also concluded that there was fault on the part of the VA in administering that drug by irrigation. In the present litigation, the Government contested the allegation of malpractice despite the administrative finding of fault.

[4] Title 28 U. S. C. § 2675 (a) in pertinent part provides:

"An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail."

Kubrick did not file an administrative claim until after he filed his action in the District Court. This possible objection to his suit the District Court found moot when the VA denied the administrative claim on April 13, 1973. The United States did not pursue the issue on appeal.

Id., at 184. As the District Court read the authorities, however, a plaintiff could avoid the usual rule by showing that he had exercised reasonable diligence and had no "reasonable suspicion" that there was negligence in his treatment. *Id.*, at 185. "[W]e do not believe it reasonable to start the statute running until the plaintiff had reason at least to suspect that a legal duty to him had been breached." *Ibid.* Here, the District Court found, Kubrick had no reason to suspect negligence until his conversation with Dr. Soma in June 1971, less than two years prior to presentation of his tort claim.

The District Court went on to hold, based on the expert testimony before it, that a reasonably competent orthopedic surgeon in the Wilkes-Barre community, which the VA doctor held himself out to be, should have known that irrigating Kubrick's wound with neomycin would cause deafness. It was therefore negligent to use that drug in that manner. Damages were determined and awarded.

Except for remanding to resolve a setoff claimed by the United States,[5] the Court of Appeals for the Third Circuit affirmed. 581 F. 2d 1092 (1978). It ruled that even though a plaintiff is aware of his injury and of the defendant's responsibility for it, the statute of limitations does not run where the plaintiff shows that "in the exercise of due diligence he did not know, nor should he have known, facts which would have alerted a reasonable person to the possibility that the treatment was improper." *Id.*, at 1097. We granted certiorari to resolve this important question of the adminis-

[5] The VA Board of Appeals' reconsideration of Kubrick's case in 1975 entitled him to an increase in his disability rating as a result of the use of neomycin. By the time of the Court of Appeals' decision, respondent had received over $50,000 in augmented disability benefits. Under 38 U. S. C. § 351, the benefits payments must be set off against the damages awarded in tort; and the increment in future monthly benefits is not paid until the aggregate amount of the benefits withheld equals the damages awarded.

tration of the statute, 440 U. S. 906 (1979), and we now reverse.

II

Statutes of limitations, which "are found and approved in all systems of enlightened jurisprudence," *Wood* v. *Carpenter*, 101 U. S. 135, 139 (1879), represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 349 (1944). These enactments are statutes of repose; and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise. *United States* v. *Marion*, 404 U. S. 307, 322, n. 14 (1971); *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 428 (1965); *Chase Securities Corp.* v. *Donaldson*, 325 U. S. 304, 314 (1945); *Missouri, K. & T. R. Co.* v. *Harriman*, 227 U. S. 657, 672 (1913); *Bell* v. *Morrison*, 1 Pet. 351, 360 (1828).

Section 2401 (b), the limitations provision involved here, is the balance struck by Congress in the context of tort claims against the Government; and we are not free to construe it so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims. *Campbell* v. *Haverhill*, 155 U. S. 610, 617 (1895); *Bell* v. *Morrison*, *supra*, at 360. We should regard the plea of limitations as a "meritorious defense, in itself serving a public interest." *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 136 (1938).

We should also have in mind that the Act waives the immunity of the United States and that in construing the statute of limitations, which is a condition of that waiver, we

should not take it upon ourselves to extend the waiver beyond that which Congress intended. See *Soriano* v. *United States*, 352 U. S. 270, 276 (1957); cf. *Indian Towing Co.* v. *United States*, 350 U. S. 61, 68–69 (1955). Neither, however, should we assume the authority to narrow the waiver that Congress intended. *Indian Towing Co.* v. *United States*, *supra*.

It is in the light of these considerations that we review the judgment of the Court of Appeals.

III

It is undisputed in this case that in January 1969 Kubrick was aware of his injury and its probable cause. Despite this factual predicate for a claim against the VA at that time, the Court of Appeals held that Kubrick's claim had not yet accrued and did not accrue until he knew or could reasonably be expected to know that in the eyes of the law, the neomycin treatment constituted medical malpractice. The Court of Appeals thought that in "most" cases knowledge of the causal connection between treatment and injury, without more, will or should alert a reasonable person that there has been an actionable wrong. 581 F. 2d, at 1096. But it is apparent, particularly in light of the facts in this record, that the Court of Appeals' rule would reach any case where an untutored plaintiff, without benefit of medical or legal advice and because of the "technical complexity" of the case, *id.*, at 1097, would not himself suspect that his doctors had negligently treated him. As we understand the Court of Appeals, the plaintiff in such cases need not initiate a prompt inquiry and would be free to sue at any time within two years from the time he receives or perhaps forms for himself a reasonable opinion that he has been wronged. In this case, for example, Kubrick would have been free to sue if Dr. Soma had not told him until 1975, or even 1980, instead of 1971, that the neomycin treatment had been a negligent act.

There is nothing in the language or the legislative history of the Act that provides a substantial basis for the Court of Appeals' construction of the accrual language of § 2401 (b).[6] Nor did the prevailing case law at the time the Act was passed lend support for the notion that tort claims in general or mal-

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[6] Respondent concedes as much with respect to the legislative history. The Act was enacted as part of the Legislative Reorganization Act of 1946. 60 Stat. 842. The Senate Report on the bill, S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946), merely states that the limitations period is one year but does not mention when a claim accrues. In 1949, the limitations period was extended to two years, Ch. 92, 63 Stat. 62, but the issue of accrual was not further addressed. H. R. Rep. No. 276, 81st Cong., 1st Sess., 1 (1949), notes that the limitations period would enlarge the period for filing to two years from "the date of accrual" but does not explain how to determine the date of accrual. Indeed, to the extent that the Report touches the issue at all, the Report seems almost to indicate that the time of accrual is the time of injury. Thus, the Report states as the reason for the amendment, in addition to bringing the Act more in line with limitations periods for state tort actions and other federal statutes:

"The 1-year existing period is unfair to some claimants who suffered injuries which did not fully develop until after the expiration of the period for making claim. Moreover, the wide area of operations of the Federal agencies, particularly the armed-service agencies, would increase the possibility that notice of the wrongful death of a deceased to his next of kin would be so long delayed in going through channels of communication that the notice would arrive at a time when the running of the statute had already barred the institution of a claim or suit." *Id.*, at 3–4.

The Act was further amended in 1966, 80 Stat. 307, to require that every claim under the Act be presented in writing to the appropriate agency as a prerequisite to suit. The Act originally required presentation to the agency only if the claim was for $1,000 or less, 60 Stat. 845. An amendment in 1959 raised the amount to $2,500, Pub. L. 86–238, 73 Stat. 472. Prior to 1966, the limitations period was keyed to the filing of suit; the 1966 amendment made the time of filing the administrative claim the critical date for limitations purposes. But although the Reports indicate these changes with precision, they do not further explicate when a tort claim "accrues" within the meaning of 28 U. S. C. § 2401 (b). S. Rep. No. 1327, 89th Cong., 2d Sess., 1, 5 (1966); H. R. Rep. No. 1532, 89th Cong., 2d Sess., 3, 8 (1966).

practice claims in particular do not accrue until a plaintiff learns that his injury was negligently inflicted. Indeed, the Court of Appeals recognized that the general rule under the Act has been that a tort claim accrues at the time of the plaintiff's injury, although it thought that in medical malpractice cases the rule had come to be that the 2-year period did not begin to run until the plaintiff has discovered both his injury and its cause.[7] But even so—and the United States was prepared

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[7] In *Urie* v. *Thompson*, 337 U. S. 163 (1949), the Court held that a claim under the Federal Employers' Liability Act did not accrue until the plaintiff's injury manifested itself. In that case, plaintiff Urie contracted silicosis from his work as a fireman on a steam locomotive. His condition was diagnosed only in the weeks after he became too ill to work. The Court was reluctant to charge Urie with the "unknown and inherently unknowable" and held that because of his "blameless ignorance" of the fact of his injury, his claim did not accrue under the Federal Employers' Liability Act until his disease manifested itself. 337 U. S., at 169–170. *Quinton* v. *United States*, 304 F. 2d 234 (CA5 1962), applied the *Urie* approach to medical malpractice claims under the Federal Torts Claims Act. Other Circuits have followed suit. *Hungerford* v. *United States*, 307 F. 2d 99 (CA9 1962); *Toal* v. *United States*, 438 F. 2d 222 (CA2 1971); *Tyminski* v. *United States*, 481 F. 2d 257 (CA3 1973); *Portis* v. *United States*, 483 F. 2d 670 (CA4 1973); *Reilly* v. *United States*, 513 F. 2d 147 (CA8 1975); *Casias* v. *United States*, 532 F. 2d 1339 (CA10 1976).

Restatement (Second) of Torts § 899, Comment *e*, pp. 444–445 (1979), reflects these developments:

"One group of cases in which there has been extensive departure from the earlier rule that the statute of limitations runs although the plaintiff has no knowledge of the injury has involved actions for medical malpractice. Two reasons can be suggested as to why there has been a change in the rule in many jurisdictions in this area. One is the fact that in most instances the statutory period within which the action must be initiated is short—one year, or at most two, being the common time limit. This is for the purpose of protecting physicians against unjustified claims; but since many of the consequences of medical malpractice often do not become known or apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy. The second reason is that the nature of the tort itself and the character of the injury will frequently

to concede as much for present purposes—the latter rule would not save Kubrick's action since he was aware of these essential facts in January 1969. Reasoning, however, that if a claim does not accrue until a plaintiff is aware of his injury and its cause, neither should it accrue until he knows or should suspect that the doctor who caused his injury was legally blameworthy, the Court of Appeals went on to hold that the limitations period was not triggered until Dr. Soma indicated in June 1971 that the neomycin irrigation treatment had been improper.[8]

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prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon.

"There are still courts that proceed to apply the rule that the action is barred by the statute even though there has been no knowledge that it could be brought. . . .

"In a wave of recent decisions these various devices have been replaced by decisions meeting the issue directly and holding that the statute must be construed as not intended to start to run until the plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it. There have also been a number of instances in which a similar rule has been applied to other professional malpractice, such as that of attorneys or accountants and the rule may thus become a general one."

[8] The Court of Appeals relied on three federal cases, all decided within the past five years, that held or indicated in dictum that a malpractice plaintiff under the federal Act must know the legal implications of the facts, as well as the facts themselves, before the limitations period will begin to run. *Exnicious* v. *United States*, 563 F. 2d 418, 420, 424 (CA10 1977); *Bridgford* v. *United States*, 550 F. 2d 978, 981–982 (CA4 1977); *Jordan* v. *United States*, 503 F. 2d 620 (CA6 1974). Since the holding below, another Circuit has endorsed these views. *De Witt* v. *United States*, 593 F. 2d 276 (CA7 1979).

The dissent, like the respondent, relies on *Urie* and *Quinton*, but neither case controls this one. Both dealt with the discovery of the factual predicate for a malpractice claim, but neither addressed the question of plaintiff's awareness of negligence on defendant's part. Contrary to the implications of the dissent, the prevailing rule under the Act has not been to postpone the running of the limitations period in malpractice cases until the plaintiff is aware that he has been legally wronged. Holdings

We disagree. We are unconvinced that for statute of limitations purposes a plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause should receive identical treatment. That he has been injured in fact may be unknown or unknowable until the injury manifests itself; and the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain. The prospect is not so bleak for a plaintiff in possession of the critical facts that he has been hurt and who has inflicted the injury. He is no longer at the mercy of the latter. There are others who can tell him if he has been wronged, and he need only ask. If he does ask and if the defendant has failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff.

In this case, the trial court found, and the United States did not appeal its finding, that the treating physician at the VA hospital had failed to observe the standard of care governing doctors of his specialty in Wilkes-Barre, Pa., and that reasonably competent doctors in this branch of medicine would have known that Kubrick should not have been treated with neomycin.[9] Crediting this finding, as we must, Kubrick

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such as the one before us now are departures from the general rule and, as indicated above, are of quite recent vintage.

[9] The trial court found:

"We credit the testimony of plaintiff's experts that the medical literature as of April 1968 contained sufficient and sufficiently widespread information as to the ototoxicity and absorption properties of neomycin to have warned [the treating physician] of the dangerousness and hence the impropriety of his treatment." 435 F. Supp. 166, 177 (ED Pa. 1977) (footnote omitted).

It further concluded:

"Those findings tell us that [the physician's] lack of knowledge, and his concomitant treatment, violated the national standard for specialists because of the generalized knowledge in the national community of orthopedic specialists of the hazards of neomycin and of its potentiality for absorption in circumstances such as those created by [the physician's]

need only have made inquiry among doctors with average training and experience in such matters to have discovered that he probably had a good cause of action. The difficulty is that it does not appear that Kubrick ever made any inquiry, although meanwhile he had consulted several specialists about his loss of hearing and had been in possession of all the facts about the cause of his injury since January 1969. Furthermore, there is no reason to doubt that Dr. Soma, who in 1971 volunteered his opinion that Kubrick's treatment had been improper, would have had the same opinion had the plaintiff sought his judgment in 1969.

We thus cannot hold that Congress intended that "accrual" of a claim must await awareness by the plaintiff that his injury was negligently inflicted. A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community. To excuse him from promptly doing so by postponing the accrual of his claim would undermine the purpose of the limitations statute, which is to require the reasonably diligent presentation of tort claims against the Government.[10] If there exists in the community a generally applicable standard of care with respect to the treatment of his ailment, we see no

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use of neomycin in 1% irrigating solution through a closed hemovac system (at least in such high and lengthy dosage). However, even if a similar locality standard were to be applied, our findings of fact support the conclusion that the information in question was available to or known by the average specialist in Wilkes-Barre to the same or similar extent as the average specialist in Philadelphia. . . .

"Finally, we conclude that what was involved was not mere error in judgment but a lack of skill or knowledge as measured, of course, by the level of medical knowledge in April, 1968." *Id.*, at 188–189.

[10] As the dissent suggests, *post*, at 128, we are thus in partial disagreement with the conclusion of the lower courts that Kubrick exercised all reasonable diligence. Although he diligently ascertained the cause of his injury, he sought no advice within two years thereafter as to whether he had been legally wronged. The dissent would excuse the omission. For statute of limitations purposes, we would not.

reason to suppose that competent advice would not be available to the plaintiff as to whether his treatment conformed to that standard. If advised that he has been wronged, he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury.

The District Court, 435 F. Supp., at 185, and apparently the Court of Appeals, thought its ruling justified because of the "technical complexity," 581 F. 2d, at 1097, of the negligence question in this case. But determining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate advice, to realize that his legal rights may have been invaded.

We also have difficulty ascertaining the precise standard proposed by the District Court and the Court of Appeals. On the one hand, the Court of Appeals seemed to hold that a Torts Claims Act malpractice claim would not accrue until the plaintiff knew or could reasonably be expected to know of the Government's breach of duty. *Ibid.* On the other hand, it seemed to hold that the claim would accrue only when the plaintiff had reason to suspect or was aware of facts that would have alerted a reasonable person to the possibility that a legal duty to him had been breached. *Ibid.* In any event, either of these standards would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty.

IV

It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable. We should give them effect in accordance with what we can ascertain the legislative intent to have been. We doubt that here we have misconceived the intent of Congress when § 2401 (b) was first adopted or when it was amended to extend the limitations period to two years. But if we have, or even if we have not but Congress desires a different result, it may exercise its prerogative to amend the statute so as to effect its legislative will.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Normally a tort claim accrues at the time of the plaintiff's injury. In most cases that event provides adequate notice to the plaintiff of the possibility that his legal rights have been invaded. It is well settled, however, that the normal rule does

not apply to medical malpractice claims under the Federal Tort Claims Act. The reason for this exception is essentially the same as the reason for the general rule itself. The victim of medical malpractice frequently has no reason to believe that his legal rights have been invaded simply because some misfortune has followed medical treatment. Sometimes he may not even be aware of the actual injury until years have passed; at other times, he may recognize the harm but not know its cause; or, as in this case, he may have knowledge of the injury and its cause, but have no reason to suspect that a physician has been guilty of any malpractice. In such cases—until today—the rule that has been applied in the federal courts is that the statute of limitations does not begin to run until after fair notice of the invasion of the plaintiff's legal rights.

Essentially, there are two possible approaches to construction of the word "accrues" in statutes of limitations: (1) a claim might be deemed to "accrue" at the moment of injury without regard to the potentially harsh consequence of barring a meritorious claim before the plaintiff has a reasonable chance to assert his legal rights, or (2) it might "accrue" when a diligent plaintiff has knowledge of facts sufficient to put him on notice of an invasion of his legal rights. The benefits that flow from certainty in the administration of our affairs favor the former approach in most commercial situations.[1] But in medical malpractice cases the harsh consequences of that approach have generally been considered unacceptable.[2] In all events, this Court adopted the latter approach over 30 years ago when it endorsed the principle that "blameless ignorance" should not cause the loss of a valid claim for

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[1] See *Gates Rubber Co.* v. *USM Corp.*, 508 F. 2d 603, 611 (CA7 1975).

[2] One should note not only the cases cited by the Court in its footnote 7, *ante*, at 120, but also the reference to "a wave of recent decisions" in the quotation from the Restatement (Second) of Torts in that footnote.

medical injuries. Writing for the Court, Mr. Justice Rutledge expressed the point simply:

> "We do not think the humane legislative plan [Federal Employers' Liability Act] intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statutes of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." *Urie* v. *Thompson*, 337 U. S. 163, 170.

This rule has been consistently applied by the Courts of Appeals in the intervening decades without any suggestion of complaint from Congress.

In my judgment, a fair application of this rule forecloses the Court's attempt to distinguish between a plaintiff's knowledge of the cause of his injury on the one hand and his knowledge of the doctor's failure to meet acceptable medical standards on the other. For in both situations the typical plaintiff will, and normally should, rely on his doctor's explanation of the situation.[3]

The *Urie* rule would not, of course, prevent the statute from commencing to run if the plaintiff's knowledge of an injury, or its cause, would place a reasonably diligent person on notice that a doctor had been guilty of misconduct. But if he neither suspects, nor has any reason to suspect, malpractice, I see no reason to treat his claim differently than if he were not aware of the cause of the harm or, indeed, of the harm itself. In this case the District Court expressly found that "plaintiff's belief that there was no malpractice was reasonable in view of the technical complexity of the question

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[3] In its discussion of the reasons why most jurisdictions have adopted a special rule for medical malpractice cases, the Restatement (Second) of Torts notes "that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon." Restatement (Second) of Torts § 899, Comment *e*, p. 444 (1979).

whether his neomycin treatment involved excessive risks, the failure of any of his doctors to suggest prior to June 1971 the possibility of negligence, and the repeated unequivocal assertions by the Veterans Administration that there was no negligence on the part of the government." 435 F. Supp. 166, 174.

The Court is certainly correct in stating that one purpose of the statute of limitations is to require the "reasonably diligent presentation of tort claims against the Government." *Ante*, at 123. A plaintiff who remains ignorant through lack of diligence cannot be characterized as "blameless." But unless the Court is prepared to reverse the Court of Appeals' judgment that the District Court's findings were adequately supported by the evidence, the principle of requiring diligence does not justify the result the Court reaches today. The District Court found that "plaintiff exercised all kinds of reasonable diligence in attempting to establish a medical basis for increased disability benefits." 435 F. Supp., at 185. That diligence produced not only the Government's denials, but, worse, what may have been a fabrication. It was only after the Government told plaintiff that Dr. Soma had suggested that plaintiff's occupation as a machinist had caused his deafness that plaintiff, by confronting Dr. Soma, first became aware that neomycin irrigation may not have been an acceptable medical practice. Plaintiff was unquestionably diligent; moreover, his diligence ultimately bore fruit. There is no basis for assuming, as this Court holds, that plaintiff could have been more diligent and discovered his cause of action sooner.

The issue of diligence in a negligence case should be resolved by the factfinder—not by the Supreme Court of the United States—and its resolution should depend on the evidence in the record, rather than on speculation about what might constitute diligence in various other circumstances.[4]

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[4] The factual predicate for the Court's speculation is its assumption that if a patient who has been mistreated by one doctor should ask

Since a large number of circuit judges have reached the same conclusion, and since I find nothing in the Court's opinion that lessens my respect for their collective wisdom, I would simply affirm the unanimous holding of the Court of Appeals for the Third Circuit affirming the judgment of the District Court which merely applied well-settled law to the somewhat unusual facts of this case.[5]

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another if the first "failed to live up to minimum standards of medical proficiency, the odds are that a competent doctor will so inform the plaintiff." *Ante,* at 122. I am not at all sure about those odds. See W. Prosser, Law of Torts 164 (4th ed. 1971); Markus, Conspiracy of Silence, 14 Clev.-Mar. L. Rev. 520 (1965); Seidelson, Medical Malpractice Cases and the Reluctant Expert, 16 Cath. U. L. Rev. 158 (1966). But whatever the odds are generally, I would prefer to have the issue of the diligence in exploring the reason for the unfortunate condition of this deaf plaintiff decided on the basis of evidence relevant to his particular injury.

[5] Not only do I dissent from the Court's result, but I also believe the decision to grant certiorari was ill-advised. The Court notes, *ante,* at 125, that Congress may change the rule announced today. I would add that Congress possesses certain options we do not have, such as creating a bifurcated statute, to temper the interest in repose when it threatens to cause an unfair result. See *Gates Rubber Co.* v. *USM Corp.,* 508 F. 2d, at 611–612. But Congress possessed the same options before this decision as well as after it. There was nothing to prevent the Executive from notifying Congress that the omission of any statutory definition of the word "accrues" has created problems that need legislative attention. Reversal of a just judgment is an unnecessarily high price to pay in order to provide Congress with that notice.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF NEW YORK ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-873. Argued October 9, 10, 1979—Decided November 28, 1979

Section 702 (b) of the Emergency School Aid Act (ESAA or Act) states that the Act's purpose is to provide federal financial assistance "to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools," to encourage "the voluntary elimination, reduction, or prevention of minority group isolation" in such schools, and to aid schoolchildren "in overcoming the educational disadvantages of minority group isolation." Section 703 pronounces as federal policy that guidelines and criteria established pursuant to the Act should "be applied uniformly in all regions of the United States." And § 706 (d)(1)(B) declares an educational agency ineligible for assistance if, after the date of the Act, it had in effect any practice "which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups" or "otherwise engage[s] in discrimination . . . in the hiring, promotion, or assignment of employees." Petitioner Board of Education's applications for ESAA assistance were denied by the Department of Health, Education, and Welfare (HEW), based upon statistical evidence flowing from a compliance investigation under Title VI of the Civil Rights Act of 1964 and showing a pattern of racially disproportionate assignments of minority teachers in the school system in relation to the number of minority students enrolled at the respective schools. No substantive rebuttal or explanation for the statistical disparities was presented. Petitioner Board then brought suit in District Court for declaratory and injunctive relief, claiming that the racially disproportionate teacher assignments resulted from provisions of state law, provisions of collective-bargaining agreements, licensing requirements for particular teaching positions, a bilingual-instruction consent decree, and demographic changes in student population. The District Court concluded that HEW should have considered these proffered justifications for the statistical disparities, and remanded the case to HEW for

further consideration. On remand, HEW determined that such justifications did not adequately rebut the prima facie evidence of discrimination established by the statistics, and the District Court upheld HEW's finding of ineligibility and denied relief. The Court of Appeals affirmed, rejecting petitioner Board's contention that HEW was required to establish that the statistical disparities resulted from purposeful or intentional discrimination in the constitutional sense.

Held:

1. Discriminatory impact is the standard by which ineligibility under ESAA is to be measured, irrespective of whether the discrimination relates to "demotion or dismissal of instructional or other personnel" or to "the hiring, promotion, or assignment of employees." The overall structure of the Act, Congress' statements of purpose and policy in §§ 702 and 703, the legislative history, and the text of § 706 (d) (1) (B) all point in the direction of such a disparate-impact test. To treat as ineligible only an applicant with a past or a conscious present intent to perpetuate racial isolation would defeat the stated objective of ending *de facto* as well as *de jure* segregation. Pp. 140–150.

2. A prima facie case of discriminatory impact may be made by a proper statistical study. The burden of rebutting such a statistical case is on the petitioner Board. P. 151.

584 F. 2d 576, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which POWELL and REHNQUIST, JJ., joined, *post*, p. 152.

Joseph F. Bruno argued the cause for petitioners. With him on the briefs were *Allen G. Schwartz* and *L. Kevin Sheridan.*

Solicitor General McCree argued the cause for respondents. With him on the brief were *Assistant Attorney General Days, Deputy Solicitor General Claiborne, Jessica Dunsay Silver, Marie E. Klimesz,* and *Vincent F. O'Rourke, Jr.**

**Charles A. Bane, Thomas D. Barr, Norman Redlich, Robert A. Murphy,* and *Norman J. Chachkin* filed a brief for the Lawyers Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents a narrow, but important, issue of statutory interpretation. It concerns a school district's eligibility for federal financial assistance under the 1972 Emergency School Aid Act (ESAA or Act), 86 Stat. 354, as amended, 20 U. S. C. §§ 1601–1619.[1] Because the federal funds available under the Act are limited, educational agencies compete for those funds.

I

By § 702 (a) of the Act, 86 Stat. 354, 20 U. S. C. § 1601 (a), Congress found "that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access." Accordingly, in § 702 (b), Congress stated that the purpose of the legislation was to provide financial assistance "to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools," to encourage "the voluntary elimination, reduction, or prevention of minority group isolation" in such schools, and to aid schoolchildren "in overcoming the educational disadvantages of minority group isolation." Section 703 pronounced as United States policy that guidelines and criteria established pursuant to the Act should "be applied uniformly in all regions of the United States." And, by § 706 (d)(1), an educational agency was expressly declared ineligible for assistance if, after the date of the Act (June 23, 1972), it

"(B) had in effect any practice, policy, or procedure

[1] The Act was technically repealed and simultaneously re-enacted, with amendments not material here, by Title VI of the Education Amendments of 1978, Pub. L. 95–561, 92 Stat. 2252, 2268, effective Sept. 30, 1979. The re-enactment is recodified as 20 U. S. C. §§ 3191–3207 (1976 ed., Supp. II). Because they govern this case and have been used throughout the litigation, the statutory references herein are to the 1972 Act, as amended, and to the old Code sections.

> which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency." [2]

The Act, in § 710 (a), provides that an agency desiring to receive assistance for a fiscal year shall submit an application "at such time, in such form, and containing such information" as the Assistant Secretary for Education of the Department of Health, Education, and Welfare (HEW) "shall require by regulation." The application is then reviewed by that office and is ranked according to criteria set out in § 710 (c), as implemented by regulation. See 45 CFR § 185.14 (1978). The essential first step is a determination [3] that the applicant

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[2] A school district found to be ineligible may apply for a waiver of its ineligibility. §§ 706 (d)(1), (2), and (3). The statute's waiver provision authorizes the Secretary of the Department of Health, Education, and Welfare to permit funding of an otherwise ineligible applicant if the applicant specifies the reason for its ineligibility and submits "such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include[s] such provisions as are necessary to insure that such activities do not reoccur after the submission of the application."

The waiver provision is not involved in this case. In a subsequent proceeding provoked by the Secretary's denial of a waiver to petitioner Board for the fiscal year 1978–1979, the Court of Appeals for the Second Circuit upheld the decision of the District Court to remand the case to HEW for reconsideration. *Board of Education of the City of New York* v. *Harris*, 622 F. 2d 599 (1979). See Brief for Petitioners 21, n. *; Brief for Respondents 2, n. 2.

[3] "No application for assistance . . . shall be approved prior to a determination by the Secretary that the applicant is not ineligible by reason of this subsection." § 706 (d)(4).

is not ineligible under § 706 (d)(1). This determination is made initially by HEW's Office for Civil Rights. The burden, presumably, is on the applicant to establish its eligibility.

II

Petitioner Board of Education of the City School District of the City of New York filed three applications for ESAA assistance for the fiscal year 1977–1978. Its revised Basic Grant Application, the only one now at issue, was given a sufficiently favorable ranking so as initially to be considered for funding in the amount of $3,559,132. On July 1, 1977, however, HEW by letter informed the Board that it did not meet the Act's eligibility requirements. App. 27. In line with the provisions of 45 CFR § 185.46 (b) (1978), an informal meeting was held on July 22. Although HEW then withdrew some of its adverse findings, it still concluded that the Board had not demonstrated a sufficient basis for revocation of its determination of ineligibility. HEW reasoned that, in the language of 45 CFR § 185.43 (b)(2) (1978), the Board's "assignment of full-time classroom teachers to [its] schools [was] in such a manner as to identify [one or more] of such schools as intended for students of a particular race, color, or national origin."

The ineligibility determination rested upon statistics developed by HEW's Office for Civil Rights during a 1976 compliance investigation of the Board's school system under Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.* From these statistics, HEW concluded that it was possible to identify a number of schools as intended for either minority or nonminority students, solely because of the composition of the faculties. The statistics revealed that, during the 1975–1976 school year, 62.6% of high school pupils were members of a minority, but only 8.3% of high school teachers were minority members. Further, 70% of the minority high school teachers were assigned to schools at which

the minority student enrollments exceeded 76%. Conversely, in those high schools where minority student enrollments were less than 40%, there was a disproportionately low percentage of minority teachers. App. 29, 42–43.

The statistical study showed like patterns at the junior high and elementary levels. The percentage of minority junior high teachers was 16.7, and these teachers were concentrated in districts with the highest percentages of minority students. *Id.*, at 29. For the elementary schools, the citywide percentage of minority teachers was 14.3, and these were placed primarily in districts with the largest minority student enrollments. *Id.*, at 28–29. HEW also relied upon findings it had made earlier that the Board was in violation of Title VI of the 1964 Act.

At the informal meeting of July 22, HEW limited its inquiry to the accuracy of the statistics upon which it had rested its decision to deny funding. No substantive rebuttal or explanation for the statistical disparities was presented. On September 16, 1977, HEW issued its formal opinion adhering to its decision of July 1 to deny funding. Brief for Petitioners 8.

The present action then was promptly instituted in the United States District Court for the Eastern District of New York to obtain declaratory relief, to enjoin HEW from enforcing its determination of ineligibility, and to award the initially earmarked funds to the Board.[4] The complaint contained no challenge to the accuracy or sufficiency of HEW's statistics. Rather, petitioner Board took the position that the racially disproportionate teacher assignments resulted from provisions of state law, from provisions of collective-bargaining agreements, from licensing requirements for

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[4] Although the litigation was instituted by petitioner Board (and its Chancellor) and by a number of Community School Districts, only the Board's request for funds remains contested. See Brief for Petitioners 8, n. **; Brief for Respondents 3, n. 3; Reply Brief for Petitioners 3, n. *.

particular teaching positions, from a consent decree relating to bilingual instruction (*Aspira of New York, Inc.* v. *Board of Education*, 72 Civ. 4002 (SDNY Aug. 29, 1974); see *Aspira of New York, Inc.* v. *Board of Education*, 65 F. R. D. 541 (SDNY 1975)), and from demographic changes in student population. The Board expressly denied that it had engaged in intentional or purposeful discrimination. App. 134–149.

Initially, the District Court, after its review of the administrative record and after a hearing, denied the Board's motion for summary judgment and granted HEW's cross-motion, thus affirming the denial of funding. The court said:

> "[T]here was a reasonable basis for a decision that it had so discriminated. This Court's powers are extremely limited. In this respect, considering the high school statistics, the State statutes, the United Federation of Teachers agreements, the wishes of individual Black principals, the desires of the individual Parent-Teachers Associations, community school board and Black and White communities, the Administrator could find a practice, policy or procedure after June 23, 1972, resulting in the identification of schools as intended for students of a particular race, color or national origin through the assignment of teachers to those schools.
>
> "Accordingly, with the greatest reluctance because it is the children of the schools who will suffer from this decision of the Administrator, the Court grants the Government's motion for summary judgment." *Id.*, at 69–70.

The Board's request for reargument, however, was granted. The District Court then concluded that HEW should have considered the justifications proffered for the statistical disparities. The matter was therefore remanded to HEW for further consideration consistent with an opinion the court issued. In that opinion, the court stated:

> "The relevant statute, regulations and cases indicate a failure of H. E. W. Before declaring a school board

ineligible for ESAA funds, H. E. W. must find either that (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make this finding, but it may not ignore evidence tending to rebut the inferences drawn from the statistics.

. . . . .

[T]he Constitution mandates that the plaintiffs must have an opportunity to rebut a statistical prima facie case of discrimination." App. to Pet. for Cert. 102–104.

After the administrative hearing on remand, HEW notified the Board that its explanation for the racially identifiable staffing patterns did not adequately rebut the prima facie evidence of discrimination established by the statistics. This determination centered on disparities in 10 of the 110 secondary schools operated by the Board and serving predominantly nonminority student bodies. App. 109–110. HEW's letter of March 22, 1978, to the Chancellor discussed the several justifications offered and concluded that each was insufficient. *Id.*, at 102–114.

The Board once again sought relief in the District Court. On April 18, that court upheld HEW's finding of ineligibility as supported by substantial evidence, and denied relief. *Id.*, at 150–153. The Board appealed and obtained a stay preserving the funds at issue pending appellate review.

The Court of Appeals affirmed. *Board of Education of City School Dist.* v. *Califano*, 584 F. 2d 576 (CA2 1978). On the appeal, the Board still did not contest the finding that certain of its schools were racially identifiable "as a result of the significant disparities in staff assignments." *Id.*, at 585. The Board, instead, argued that HEW was required " to establish that the disparities resulted from purposeful or intentional

discrimination in the constitutional sense." *Ibid.* The Court of Appeals rejected this contention. It held that Congress has the authority "to establish a higher standard, more protective of minority rights, than constitutional minimums require," and that "Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments." *Id.*, at 588. It further concluded that HEW's denial of funding was not arbitrary or capricious. *Id.*, at 589. The several proffered justifications were either inadequate to explain the disparities or were unsupported by facts appearing on the record. *Ibid.*

Because of the importance of the issue, we granted certiorari. *Sub nom. Board of Education of City School Dist.* v. *Califano,* 440 U. S. 905 (1979). The stay preserving the funds remains in effect. See Fed. Rule App. Proc. 41 (b).

III

Our primary concern is with the intent of Congress. Section 706 sets forth the eligibility criteria for ESAA funding. In subsection (a)(1) it authorizes a grant to a local educational agency that (i) is implementing a desegregation plan approved by a court, or by HEW "as adequate under title VI of the Civil Rights Act of 1964," or (ii), "without having been required to do so," has a plan to eliminate or reduce minority group isolation.

Critical to the resolution of the issue in this case, however, are the *ineligibility* provisions of § 706 (d)(1)(B), quoted above in Part I of this opinion. Ineligibility comes about if the agency either has in effect a practice "which results in the disproportionate demotion or dismissal of . . . personnel from minority groups," *or* "otherwise engage[s] in discrimination . . . in the hiring, promotion, or assignment of employees." The mere reading of this language reveals that it suffers from imprecision of expression and less than careful draftsmanship. The first portion clearly speaks in terms of effect

or impact. The second portion, arguably, might be said to possess an overtone of intent. There is nothing specifically indicating that this difference exists or, if it does, that it was purposefully drawn by Congress. The existence and significance of the difference are important for petitioner Board, for we are concerned here not with "disproportionate demotion or dismissal of . . . personnel," but with racial "discrimination" in the "assignment of employees."

The Board, as a consequence, argues that it was not the aim of Congress to permit HEW to find that an applicant was ineligible for funding because of its staff assignments unless those assignments were purposefully discriminatory and thus violative of the Equal Protection Clause of the Fourteenth Amendment; it follows, says the Board, that disproportionate impact alone, without proof of purposeful discrimination, is insufficient. *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406 (1977); *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252 (1977); *Washington* v. *Davis*, 426 U. S. 229 (1976); and *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189 (1973), are cited. The Board, in other words, would have us interpret the assignment clause as one imposing a constitutional standard. It contends that the test under Title VI of the 1964 Civil Rights Act also provides the measure under ESAA of disqualifying discrimination and of ineligibility. It claims that HEW's finding of intentional discrimination erroneously relied upon a foreseeability test, and that, even if such a test were applicable, the finding was based solely on statistical evidence of disparate impact and that such evidence is insufficient.

Respondents, in their turn, preliminarily assert that it is unnecessary to argue about the correctness of HEW's finding on the administrative record, and that it is also unnecessary to pursue the dictum of the Court of Appeals to the effect that Title VI condemns practices having a disparate racial impact, although no purposeful discrimination is shown. See 584 F. 2d, at 589; but see *Parent Assn. of Andrew Jackson High*

School v. *Ambach*, 598 F. 2d 705, 715–716 (CA2 1979). Respondents argue that there is no place here for equivocation: under 45 CFR § 185.43 (b)(2) (1978), an agency is ineligible for funding if it has assigned full-time teachers to schools "in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin." This, it is said, is an objective criterion. Respondents note that the Board's only argument is that on the record no finding properly could be made that the assignment patterns resulted from intentional or purposeful discrimination, and thus, unless the constitutional standard applies, the Board effectively has conceded that the denial of funds was permissible. For the respondents, then, the sole issue is whether the Act authorizes the withholding of funds when the applicant's faculty assignments, although not shown to amount to purposeful racial discrimination violative of the Equal Protection Clause, are not justified by educational needs.

IV

Intent v. *Impact.* The denial of funds to the Board resulted from a violation of HEW's regulation, that is, teacher assignments that served to identify certain schools racially. This led to ineligibility irrespective of whether it was the product of purposeful discrimination. The controversy thus comes down to the question whether that interpretation by regulation is consistent with the governing statute. While perhaps it might be possible to theorize and to parse the language of § 706 (d)(1)(B), as the Board so strongly urges, in such a way as to conclude that impact alone is sufficient for ineligibility with respect to "demotion or dismissal," but intent is necessary with respect to "assignment of employees," we conclude that the wording of the statute is ambiguous. This requires us to look closely at the structure and context of the statute and to review its legislative history. When we do this, we are impelled to a conclusion

adverse to the Board's position here. We hold that impact or effect governs both prongs of the ineligibility provision of § 706 (d)(1)(B). The overall structure of the Act, Congress' statements of purpose and policy, the legislative history, and the text of § 706 (d)(1)(B) all point in the direction of an impact test.

A reading of the Act in its entirety indisputably demonstrates that Congress was disturbed about minority segregation and isolation as such, *de facto* as well as *de jure*, and that, with respect to the former, it intended the limited funds it made available to serve as an enticement device to encourage voluntary elimination of that kind of segregation. The Board acknowledges that the Act was conceived in part to provide "a financial impetus to *de facto* segregated systems to voluntarily desegregate." Brief for Petitioners 22.

That it was effect, and not intent, that was dominant in the congressional mind when ESAA was enacted is apparent from the specific findings set forth in § 702. Congress' concern was stated expressly to be about "minority group isolation and improving the quality of education for all children." The stated purpose of the legislation was the elimination of this isolation. The focus clearly is on actual effect, not on discriminatory intent. Furthermore, the pronouncement of federal policy, set forth in § 703, speaks in terms of national uniformity with respect to "conditions of segregation by race" in the schools. All "guidelines and criteria," presumably including those governing ineligibility, must "be applied uniformly," and "without regard to the origin or cause of such segregation." This, too, looks to effect, not purpose.

There can be no disagreement about the underlying philosophy of the Act. At the time of ESAA's passage, it was generally believed that the courts, when implementing the Constitution, could not reach *de facto* segregation. See, *e. g.*, 117 Cong. Rec. 11519 (1971) (remarks of Sen. Mondale). Congress, apparently, was not then in much of a mood to mandate a change in the status quo. The midground solution found

and adopted was the enticement approach "to encourage the voluntary elimination, reduction, or prevention of minority group isolation," as § 702 (a)(2) of the Act recites. Thus, it would make no sense to allow a grant to a school district that, although not violating the Constitution, was *maintaining* a *de facto* segregated system. To treat as ineligible only an applicant with a past or a conscious present intent to perpetuate racial isolation would defeat the stated objective of ending *de facto* as well as *de jure* segregation.

Other provisions of the Act indicate that an effect test is the Act's rule, not its exception. Section 706 (d)(1)(A) disqualifies an agency that transfers property or makes services available to a private school or system without first determining ("knew or reasonably should have known") that the recipient does not discriminate. Here, plainly, ineligibility results from something other than invidious motive; the applicant is ineligible even when it is merely negligent in failing to discover the character of the recipient's operations. Similarly, § 706 (d)(1)(C), which has to do with the assignment of children to particular classes within a school, provides for ineligibility whenever "any procedure . . . results in the separation of minority group from nonminority group children for a substantial portion of the school day." The only exception is where there is "bona fide ability grouping." These strike us as "effect," not "intent," provisions.[5]

Close analysis of § 706 (d)(1)(B), the specific provision at issue, also convinces us that its focus is on impact, not intent.

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[5] There is a definite exception to this pattern in § 706 (d)(1)(D). This is conceded by HEW. Brief for Respondents 16. In subsection (D) the statute speaks of any practice "such as limiting curricular or extracurricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities." This, clearly, is language of intent and motive. But in this context a mere effect test would be out of place and mischievous, for it would automatically condemn every administrative decision not to offer a particular course or program, however benign or however dictated by budgetary exigencies.

The Board concedes, almost inescapably, that with respect to disproportionate demotion or dismissal of personnel, Congress imposed only an objective or disparate-impact test. Brief for Petitioners 25; Tr. of Oral Arg. 5–6. We agree. Unless a solid reason for a distinction exists, one would expect that, for such closely connected statutory phrases, a similar standard was to apply to assignment of employees. The presence of the word "otherwise" in the second portion of § 706 (d)(1)(B) ("or otherwise engaged in discrimination . . . in the . . . assignment of employees"), while perhaps not persuasive in itself alone, is not without significance. It lends weight to the argument that a disparate-impact standard also controls assignment practices.

We also find support for this interpretation in the Report of the Senate Committee on Labor and Public Welfare concerning the Emergency School Aid and Quality Integrated Education Act of 1971, which was one of the proposed ESAA bills:

> "This clause [the one that later became § 706 (d)(1)(B) of ESAA] renders ineligible any local educational agency which discriminates in its employment practices, and specifically presumes one practice to be discriminatory: the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregating its schools or establishing integrated schools." S. Rep. No. 92–61, p. 41 (1971).

The words "presumes one practice" are emphasized by the Board, however, and are claimed to indicate that the Senate Committee was making "a significant and conscious distinction between the language of the section which relates to 'demotion or dismissal' and that which relates to 'hiring, promotion or assignment.'" Brief for Petitioners 26.

If there is a distinction between the two phrases, however, it is not inconsistent with the general impact orientation of § 706 (d)(1)(B). For the impact approach itself embraces at least two separate standards: a rebuttable disparate-impact

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test and a stricter irrebuttable disproportionate-impact test. To the extent that the "demotion or dismissal" clause sets a higher standard for school boards to meet, it corresponds to the irrebuttable impact test. Indeed, another passage of the Senate Committee Report states:

> "For the purposes of this bill, disproportionate demotion or dismissal of instructional or other personnel is considered discriminatory and constitutes *per se* a violation of this provision, when it occurs in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation." S. Rep. No. 92–61, at 18–19.

The reference to a *per se* violation strongly suggests that there was to be no excuse for a significant disparity in treatment of the races with respect to demotions or dismissals, "*when* [*the disparity*] *occurs* in conjunction with desegregation, the establishment of an integrated school, or reducing, eliminating or preventing minority group isolation." (Emphasis added.) [6] In contrast, the rebuttable impact test governing hiring, promotion, and assignment, permits the school board to justify apparently disproportionate treatment.

Other aspects of the legislative history also are supportive of our interpretation. Not without relevance is the emergence of the so-called "Stennis Amendment," now § 703 (a), that pronounced national policy. The concept of a nationally uniform standard was proposed by Senator Stennis of Mississippi in April 1971 in the debate on the proposed Emergency School Aid and Quality Integrated Education Act of 1971, S. 1557, 92d Cong., 1st Sess. (1971). See 117 Cong. Rec. 11508–11520 (1971). Proponents of the Amendment argued that school districts in the South were being forced to desegregate in order to receive federal emergency assistance, while those elsewhere could continue to receive such assistance despite existing seg-

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[6] The authors of the Report, of course, were aware of massive firings of black teachers in the South. S. Rep. No. 92–61, at 18.

regation conditions.[7] Opponents were concerned that the proposed amendment might be read as cutting back on desegregation efforts in States that had segregated their schools by law.[8] The Stennis Amendment was adopted and was included in the final version of ESAA when it was enacted as Title VII of the Education Amendments of 1972. Senator Stennis summarized his proposal in the final debate.[9]

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[7] "The Stennis amendment would provide that there be a national school policy applied equally to all States, localities, regions, and sections of the United States. The adoption of this amendment would help to eliminate the use of the 'double standard,' which has resulted in the requirements for the integration of the public schools being given a very stringent application in the South and a very lenient application elsewhere.

. . . . . .

"I have never been able to understand how a 10-year-old colored student in a public school in Harlem, Watts, or South Chicago, is expected to look around and see nothing but black faces in his classroom and say to himself: 'This kind of racial separation does not hurt me because the State of Illinois does not have a law requiring me to attend all-black schools. I should not feel hurt by this racial separation because it is the result of housing patterns that just accidentally developed.'" 117 Cong. Rec. 11511–11512 (1971) (remarks of Sen. Eastland).

See also *id.*, at 11508–11510 (remarks of Sen. Stennis).

[8] "What worries me is this: It could be argued, if this became law, that the Attorney General and the Secretary of Health, Education, and Welfare could be told, 'Do not seek a remedy against an instance where there is official discrimination unless you can also tell me how you can uniformly find the same kind of remedy available to eliminate segregation which does not have an official basis.'

"The way it reads, I believe that argument might be made.

. . . . . .

"I fear this amendment could be construed as an endorsement of weakened enforcement throughout this Nation. The reason why I oppose it . . . is that I fear it will be read as a policy statement calling for a national policy of nonenforcement." *Id.*, at 11517–11518 (remarks of Sen. Mondale).

See also *id.*, at 11516–11517 (remarks of Sen. Javits).

[9] "That is what the conferees have done and that language speaks for itself. For the first time, if this conference report is adopted and the bill is signed into law, we will have a uniform national policy in school deseg-

This history of § 703 (a) indicates that the statute means exactly what it says: the same standard is to govern nationwide, and is to apply to *de facto* segregation as well as to *de jure* segregation.[10] It suggests ineligibility rules that focus

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regation matters, North, South, East, and West applied uniformly without regard to the origin or cause of such segregation. That is the Stennis amendment, pure and simple." 118 Cong. Rec. 18844 (1972).

[10] The dissent suggests that no support for an impact standard is provided by the Stennis Amendment, since that Amendment also applies to Title VI, and Title VI does not incorporate an impact test. The Stennis Amendment, as enacted, however, was broken into two subsections, with subsection 703 (a) applying to guidelines and criteria under ESAA, and subsection 703 (b) applying to guidelines and criteria under Title VI. The Conference Report on this section explained the distinction:

"The House amendment stated the policy of the United States that guidelines and criteria established *pursuant to this title* shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The Senate amendment stated the policy of the United States that guidelines and criteria established pursuant to *Title VI of the Civil Rights Act . . . and this title* shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether *de jure* or *de facto* in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation. The conference substitute retains both the Senate and House provisions but deletes the reference in the Senate amendment to this title. The conference substitute's version of the Senate provision, therefore, restates the policy contained in section 2 (a) of Pub. L. 91–230 and in no way supersedes subsection (b) of such section." S. Conf. Rep. No. 92–798, pp. 212–213 (1972). (Emphasis added.)

It is clear from this explanation that the House version became § 703 (a), and the Senate version became § 703 (b). The explanation that the conference version of the Senate provision does not supersede § 2 (b) of Pub. L. 91–230 is critical. Section 2 of Pub. L. 91–230, 84 Stat. 121, 42 U. S. C. § 2000d–6, provides in relevant part:

"(a) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 . . . dealing with conditions of segregation by race, whether de jure or de facto, in the schools of the local educational agencies of any State shall be applied

on actualities, not on history, on consequences, not on intent.[11]

The Board's reliance on a colloquy between Congressman Pucinski, ESAA's sponsor in the House, and Congressman Esch does not persuade us otherwise. Mr. Esch inquired whether "the Secretary [will] be authorized to apply the holding in the Singleton case [*Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F. 2d 1211 (CA5 1969), rev'd in part on other grounds *sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U. S. 290 (1970)]—which is that you have to have a perfect racial balance in the faculty in every single school in your district—as a condition or requirement for assistance under this program." Mr. Pucinski's response was: "The answer is absolutely not." 117 Cong. Rec. 39332 (1971).

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uniformly in all regions of the United States whatever the origin or cause of such segregation.

"(b) *Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.*" (Emphasis added.)

Thus, the version of the Stennis Amendment which applies under Title VI, as explained by § 2 (b) of Pub. L. 91–230, is significantly different from the ESAA version of the Stennis Amendment. In view of this difference, it is not at all "wholly incongruous to hold in this case that the Stennis Amendment supports a mere 'disparate impact' reading of the term 'discrimination' in § 706 (d) (1) (B) of ESAA, when only two Terms ago five Members of the Court construed the prohibition against 'discrimination' in federally funded programs under Title VI, which is equally subject to the Stennis Amendment, to incorporate a purposeful-discrimination test," as the dissent asserts, *post*, at 160. Programs funded under Title VI are not "equally" subject to the Stennis Amendment; they are subject to a different version of the Stennis Amendment.

[11] Petitioner Board acknowledges that for funding purposes, the distinction between *de jure* and *de facto* segregation was "erased" in ESAA. Brief for Petitioners 23, 32. But it would tie this erasure only to the *eligibility* standards of § 706 (a) (1) (court-ordered, HEW-approved, or voluntary plan of desegregation) and not to the *ineligibility* criteria of § 706 (d).

We do not so limit or circumscribe the statute. Section 703 (a) applies to all "guidelines and criteria."

While it might be argued that this passing exchange intimates some limit on HEW's ability to require complete elimination of *de facto* segregation as a condition of ESAA eligibility, we do not regard the regulation at issue here as at all inconsistent with the colloquy, and we find no indication in the legislative history that any Member of Congress voted in favor of the amendment in reliance on an understanding that it would weaken the eligibility conditions. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 713–716 (1979). HEW, by its regulation, does not require faculties to be in perfect racial balance. It prohibits only faculty assignments that make schools racially identifiable. That is a much narrower requirement.

Finally, there is some significance in the fact that Congress was aware of HEW's existing regulation when ESAA was reenacted in 1978. See n. 1, *supra*. The House version included a waiver-of-ineligibility provision to respond to complaints about the application of the regulation to Los Angeles and New York City. See H. R. Rep. No. 95–1137, pp. 95–96 (1978).[12] The waiver provision was dropped in the Conference Committee Report. See H. R. Conf. Rep. No. 95–1753, p. 286 (1978). It is of interest to note that the president of the American Federation of Teachers, as a witness, recommended to the Senate "that the ESAA be *reformed* to require a finding of discrimination, not simply a numerical imbalance, before ESAA funds can be cut off." Education Amendments of 1977, Hearings on S. 1753 before the Subcom-

[12] "In an attempt to deal with this problem, the Committee bill adopts an amendment making clear that school districts which are undertaking efforts to integrate their faculty but which have not yet fully achieved that goal may nonetheless obtain a waiver of ineligibility. Presently, the Department of Health, Education, and Welfare is interpreting the law as requiring school districts to complete faculty integration before they can apply for funds. The purpose of this amendment is to assist those school districts while they are trying to achieve that goal."

mittee on Education, Arts and Humanities of the Senate Committee on Human Resources, 95th Cong., 1st Sess., pt. 1, p. 1275 (1977) (emphasis added). No such change, however, was made. This strongly suggests that Congress acquiesced in HEW's interpretation of the statute. See *Andrus* v. *Allard*, *ante*, at 57. *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974).

There is no force in the suggestion that a decision adverse to the Board here will serve to harm or penalize the very children who are the objects of the beneficial provisions of the Act. A ruling of ineligibility does not make the children who attend the New York City schools any worse off; it does serve to deny them benefits that in theory would make them better off. The funds competed for, however, are not wasted, for they are utilized, in any event, to benefit other similarly disadvantaged children. It is a matter of benefit, not of deprival, and it is a matter of selectivity.

For these several reasons, we readily conclude that the discrimination that disqualifies for funding under ESAA is not discrimination in the Fourteenth Amendment sense. Disproportionate impact in assignment of employees is sufficient to occasion ineligibility. Specific intent to discriminate is not an imperative. There thus is no need here for the Court to be concerned with the issue whether Title VI of the Civil Rights Act of 1964 incorporates the constitutional standard. See *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978). Consideration of that issue would be necessary only if there were a positive indication either in Title VI or in ESAA that the two Acts were intended to be coextensive. The Board stresses the fact that a desegregation plan approved by HEW as sufficient under Title VI is expressly said to satisfy the eligibility requirements of § 706 (a). The ineligibility provisions of § 706 (d), however, contain additional requirements, and there is no indication that mere compliance with Title VI satisfies them. Nor does the fact that a viola-

tion of Title VI makes a school system ineligible for ESAA funding mean that only a Title VI violation disqualifies.

It does make sense to us that Congress might impose a stricter standard under ESAA than under Title VI of the Civil Rights Act of 1964. A violation of Title VI may result in a cutoff of all federal funds, and it is likely that Congress would wish this drastic result only when the discrimination is intentional. In contrast, only ESAA funds are rendered unavailable when an ESAA violation is found. And since ESAA funds are available for the furtherance of a plan to combat *de facto* segregation, a cutoff to the system that *maintains* segregated faculties seems entirely appropriate. The Board's proffered distinction between funding and eligibility, that is, that a *de jure* segregated system was to be required to desegregate in order to receive assistance, but a *de facto* system was not, contravenes the basic thrust of ESAA. We are not persuaded by the suggestions to the contrary in *Board of Education, Cincinnati* v. *HEW*, 396 F. Supp. 203, 255 (SD Ohio 1975), aff'd in part and rev'd in part on other grounds, 532 F. 2d 1070 (CA6 1976), and in *Bradley* v. *Milliken*, 432 F. Supp. 885, 886–887 (ED Mich. 1977).[13]

[13] We find the reasoning of the District Court in *Robinson* v. *Vollert*, 411 F. Supp. 461, 472–475 (SD Tex. 1976), rev'd, 602 F. 2d 87 (CA5 1979), upon which the Board also relies, clearly distinguishable. This case concerned an attempt by HEW to impose conditions upon the receipt of ESAA funds different from those imposed by a court overseeing court-ordered desegregation. A court-ordered plan is deemed sufficient under Title VI. Elementary and Secondary Education Amendments of 1967, § 112, 81 Stat. 787, 42 U. S. C. § 2000d–5. The court in *Vollert* reasoned that a court-ordered plan also should be deemed in compliance with ESAA. While we do not pass upon the issue, it may be that what constitutes acceptable integration is the same under both Title VI and ESAA, and that HEW may not require a remedy different from that imposed by a court. Even so, that would not mean that what constitutes discrimination is the same under both statutes. ESAA was an attempt by Congress to bring about the same remedy without regard to the cause of the problem, while Title VI may have been intended to remedy the problem only when its cause was intentional discrimination.

Proof of Impact. It is unnecessary to indulge in any detailed comment about the proof of impact in this case. The Court of Appeals did not discuss whether the statistical evidence flowing from the 1976 compliance investigation established a prima facie case. This apparently was because petitioners did not challenge the accuracy or sufficiency of respondents' data and statistics, but relied on justifications to explain the statistical disproportions in teacher assignments.

As we have indicated, the disparate-impact test in the second part of § 706 (d)(1)(B) is rebuttable. We conclude, however, that the burden is on the party against whom the statistical case has been made. See *Castaneda* v. *Partida*, 430 U. S. 482, 497–498, and n. 19 (1977); *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 432 (1971). That burden perhaps could be carried by proof of "educational necessity," analogous to the "business necessity" justification applied under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.*; see, *e. g.*, *Dothard* v. *Rawlinson*, 433 U. S. 321, 329 (1977); *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 581–583 (1978) (dissenting opinion).

The Court of Appeals ruled that each of the justifications asserted by petitioners, which included compliance with requirements of state law and collective-bargaining agreements, teacher preferences, unequal distributions of licenses in certain areas, compliance with the provisions of the bilingual-instruction consent decree, and demographic changes in student population, either was insufficient as a matter of law or was not supported by evidence in the record. Petitioners did not contest these conclusions in their petition for a writ of certiorari or in their brief in this Court. Thus, we express no opinion on whether any of the justifications proffered by the Board would satisfy its burden.

V

In sum, we hold that discriminatory impact is the standard by which ineligibility under ESAA is to be measured, irrespec-

tive of whether the discrimination relates to "demotion or dismissal of instructional or other personnel" or to "the hiring, promotion, or assignment of employees"; that a prima facie case of discriminatory impact may be made by a proper statistical study and, in fact, was so made here; and that the burden of rebutting that case was on the Board.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST join, dissenting.

The Court holds that the Emergency School Aid Act of 1972 (ESAA) [1] renders ineligible for ESAA funding any school district whose faculty assignment policies have resulted in racial disparities, even in the total absence of any evidence of intentional racial discrimination. I disagree. It is my view that a school district is ineligible to receive ESAA funds only if it has acted with a racially discriminatory motive or intent in its faculty assignment policies.

I

The controversy in this case turns on the proper construction of § 706 (d)(1)(B) of ESAA, which provides:

> "No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> . . . . .
>
> "(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismis-

[1] 20 U. S. C. §§ 1601–1619. In 1978, Congress re-enacted ESAA with amendments not material here and recodified the statute at 20 U. S. C. §§ 3191–3207 (1976 ed., Supp. II). See Education Amendments of 1978, Title VI, 92 Stat. 2252, 2268. The provision at issue here, former § 706 (d)(1)(B), is now codified at 20 U. S. C. § 3196 (c)(1)(B) (1976 ed., Supp. II). In the interest of consistency with the Court's opinion, all statutory references herein are to the original statutory and Code provisions.

sal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, *or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency. . . .*" (Emphasis added.)

Since the only discriminatory activity alleged in this case involves the assignment of teachers, the inquiry must focus on the second (italicized) clause of § 706 (d)(1)(B). The precise question is what Congress intended when it used the phrase "or otherwise engaged in discrimination."

In deciding that question, the starting point is the language of the statute itself. See, *e. g., Southeastern Community College* v. *Davis*, 442 U. S. 397, 405. That language, as the positions of the parties to this suit confirm, may be read in two different ways. The first, that urged by the respondents and endorsed by the Court, is that the ineligibility standard under the second clause of § 706 (d)(1)(B), like that under the first clause, turns solely on a finding of disparate racial impact. This reading is supported by the argument that the second clause, which renders ineligible for ESAA funding any school district "engaged in discrimination . . . in the hiring, promotion, or assignment of employees" is linked by the word "otherwise" to the first clause, which unambiguously contains a disparate-impact standard. The argument thus is based on the doctrine of *ejusdem generis*, construing the word "otherwise" to mean "in a similar manner" or "similiarly." The second way to read the statute, that urged by the petitioners, is to find different ineligibility standards in the two clauses of § 706 (d)(1)(B)—disparate impact alone under the first clause, and discriminatory motive or intent under the second. This reading of the statute is supported by the fact that although the first clause of § 706 (d)(1)(B) is explicitly written in terms of disproportionate

impact, the second clause is framed in terms that, as the Court today perceives, "possess an overtone of intent." [2] *Ante*, at 139. Since the meaning of § 706 (d)(1)(B) is thus concededly ambiguous, it is necessary to look beyond the statutory words in order to ascertain their meaning.

II

That inquiry may appropriately focus on whether the intent of Congress can be determined from a consideration of the legislative history of § 706 (d)(1)(B) itself, or of other provisions of ESAA.[3]

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[2] The petitioners also argue that the doctrine of *ejusdem generis* is not appropriately applied in this context inasmuch as the word "otherwise" is not preceded by an enumeration of a number of types of conduct, but rather by a single type of highly particularized conduct. See 2A C. Sands, Statutes and Statutory Construction § 47.17 (4th ed. 1973). In this context, the petitioners argue that the word "otherwise" conveys a sense not of similarity, but of contrast: the section first describes, without regard to motive or intent, disproportionate demotions or dismissals; then, in apparent contrast to the first type of conduct, it describes "discrimination" in the hiring, promotion, or assignment of staff.

[3] The respondents also rely on the "general scheme" of ESAA for its reading of the second clause of § 706 (d)(1)(B) as incorporating no more than a disparate-impact ineligibility standard. This reliance is misplaced. Although one of the concerns of Congress in enacting ESAA was to eliminate minority isolation regardless of its cause, Congress also had in mind other important objectives in enacting the legislation. One such objective was to meet the special educational needs of minority group children from environments in which the dominant language is other than English. See S. Rep. No. 92–61, pp. 22–24 (1971). To attain this objective, Congress earmarked certain ESAA funds for programs to assist these children in developing linguistic skills in both English and the language they speak at home. § 708 (c) of ESAA, 20 U. S. C. § 1607 (c).

The respondents' construction of § 706 (d)(1)(B), if literally applied, could wholly frustrate this congressional purpose by making ineligible for ESAA funds those school districts whose faculty assignment policies have caused racial disparities resulting from bona fide efforts to meet the special educational needs of non-English-speaking children. In a situation where, for example, a school district is making special efforts to provide bilingual instruction to Spanish-speaking children, it would be hardly

A

The legislative history of the specific provision in issue reveals that the language that ultimately was enacted in § 706 (d)(1)(B) first appeared in S. 1557, 92d Cong., 1st Sess., a bill reported out of the Senate Committee on Labor and Public Welfare in 1971. In explaining the language at issue here, the Committee noted:

> "The phrase 'disproportionate demotion or dismissal of instructional or other personnel from minority groups' *is not modified or in any way diminished* by the subsequent phrase 'or otherwise engaged in discrimination based upon race, color or national origin,' which renders ineligible local educational agencies which have engaged in other discrimination, including discrimination in hiring, against minority group employees." S. Rep. No. 92–61, p. 19 (1971) (emphasis added).

It is thus apparent that the Senate Committee that drafted the language now appearing in § 706 (d)(1)(B) not only recognized a distinction between the ineligibility standards under the first and second clauses, but also regarded the standard of ineligibility under the first clause as more burdensome to the applicant than the standard under the second.

The purpose of this differentiation is also made clear in the legislative history. Congress singled out staff demotions and dismissals as appropriate for a disparate-impact standard because it was well documented that desegregation activities had in some States resulted in the wholesale firing of Negro faculty members: "HEW statistics indicate that between 1968

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surprising to find a disproportionate number of Hispanic teachers assigned to schools serving Hispanic students. Yet, if the disparate-impact test were literally applied, this bona fide attempt to advance the goals of ESAA would render the school district ineligible for further ESAA funding. It can hardly be said, therefore, that the overall purposes of ESAA unerringly point to the respondents' reading of the second clause of § 706 (d)(1)(B).

and 1970, in the States within the Fifth Judicial Circuit alone, the number of black teachers was reduced by 1,072, while the number of white teachers increased by 5,575." S. Rep. No. 92–61, *supra*, at 18. These statistics so disturbed Congress that it adopted a *per se* rule of ineligibility for disproportionate demotions or dismissals of Negro faculty members in conjunction with desegregation activities, even at the cost of withholding ESAA funds from school districts that had in no way intentionally discriminated against Negro faculty members.

The legislative history of § 706 (d)(1)(B) thus strongly suggests that the petitioners have advanced the proper interpretation of the statute. This reading of § 706 (d)(1)(B), under which the first clause is governed by disparate impact and the second by motive or intent, is consistent with the fact that Congress not only recognized a distinction between the ineligibility standards under the first and second clauses, but also regarded the standard of ineligibility under the first clause as more burdensome to the applicant than the standard under the second.

Apparently recognizing that the legislative history cannot support a reading of § 706 (d)(1)(B) that gives the same meaning to the ineligibility standards under its first and second clauses, the Court observes:

> "If there is a distinction between the two phrases, however, it is not inconsistent with the general impact orientation of § 706 (d)(1)(B). For the impact approach itself embraces at least two separate standards: a rebuttable disparate-impact test and a stricter irrebuttable disproportionate-impact test. To the extent that the 'demotion or dismissal' clause sets a higher standard for school boards to meet, it corresponds to the irrebuttable impact test." *Ante*, at 143–144.

To draw this distinction between the two clauses is, however, totally at odds with the Court's earlier endorsement of

the respondents' reading of the language of the provision. That reading depends wholly on the proposition that inasmuch as the first clause describes disparate impact, the presence of the word "otherwise" in the second clause "lends weight to the argument that a disparate-impact standard [is] also [the standard of ineligibility under the second clause]." *Ante*, at 143. It should follow that the standard contained in both clauses is the same—that the second clause incorporates the irrebuttable disparate-impact standard embodied in the first. The Court's contrary suggestion that an irrebuttable standard is contained in the first clause, but only a rebuttable standard in the second, is nowhere in the Court's opinion squared with the Court's express agreement with the respondents' reading of the language of § 706 (d)(1)(B).[4]

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[4] Yet another problem with the Court's conclusion that the second clause of § 706 (d)(1)(B) creates a rebuttable disparate-impact standard is the fact that the Court never explains its later suggestion that an applicant may rebut a prima facie showing of discrimination only by proof of error in the statistics or by an " 'educational necessity' [showing], analogous to the 'business necessity' justification applied under Title VII of the Civil Rights Act of 1964." *Ante*, at 151.

By referring to the "business necessity" justification under Title VII, the Court apparently is construing the term "discrimination" in § 706 (d)(1)(B) by reference to those cases under Title VII which have not required a showing of discriminatory intent on the part of the employer, *e. g.*, *Griggs* v. *Duke Power Co.*, 401 U. S. 424. Under the doctrine of those cases, a Title VII violation may be found if the plaintiff demonstrates that an employment practice has a disparate racial impact and the employer is then unable to justify the practice on the grounds of "business necessity." *Id.*, at 431–432. By analogy to this type of employment discrimination, the Court apparently concludes that the second clause of § 706 (d)(1)(B) renders ineligible any school district whose faculty assignment policies have a disparate racial impact not justified by educational needs.

It is my view, however, that this category of Title VII cases has no bearing on the meaning of the term "discrimination" in the second clause of § 706 (d)(1)(B). Our cases make clear that the theory of "disparate impact" under Title VII is a gloss on the specific statutory language of §§ 703 (a)(2) and 703 (h) of Title VII, see *General Electric Co.* v. *Gil-*

The fact of the matter is that the legislative history simply belies the respondents' reading of the statutory language. That history strongly supports the conclusion that, while the first clause of § 706 (d)(1)(B) incorporates a disparate-impact standard, the second clause makes ineligibility depend upon discriminatory motive or intent.

B

The other provisions of ESAA, and particularly the so-called Stennis Amendment, do not, it seems to me, support the weight the Court places upon them.[5]

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bert, 429 U. S. 125, 137; *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 425, n. 21; *Griggs* v. *Duke Power Co.*, *supra*, at 426, n. 1. Under § 703 (a)(2), it is an unlawful employment practice for an employer

"to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2 (a)(2).

Section 703 (h) provides that it is not unlawful for an employer

"to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin," 42 U. S. C. § 2000e–2 (h).

The language of these provisions quite plainly does not track that in § 706 (d)(1)(B), for § 703 (a)(2) fails even to include the term "discrimination," and while the term does appear in § 703 (h), it is expressly modified—"*used* to discriminate"—in such a manner as to incorporate a disparate-impact test. Since the language of §§ 703 (a)(2) and 703 (h) of Title VII in no way resembles that at issue here, those provisions are obviously not an appropriate guide to the definition of "discrimination" under § 706 (d)(1)(B).

If there is an appropriate analogy to Title VII, it is a quite different one. See Part III of this opinion.

[5] The Court also finds support for its reading of § 706 (d)(1)(B) in the fact that at least two of the three other ineligibility provisions in § 706 (d)(1) do not require a showing of intent. Accordingly, the Court notes that "an effect test is the Act's rule, not its exception." *Ante*, at 142. Even putting aside doubts as to the validity of the premise of this

The Stennis Amendment, enacted as § 703 of ESAA, 86 Stat. 354, provides:

> "(a) It is the policy of the United States that guidelines and criteria established pursuant to [ESAA] shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.
>
> "(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 . . . shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation."

The Court concludes that the Stennis Amendment and its legislative history "indicat[e] that the statute means exactly what it says: the same standard is to govern nationwide, and is to apply to *de facto* segregation as well as to *de jure* segregation. It suggests ineligibility rules that focus on actualities, not on history, on consequences, not on intent." *Ante*, at 146–147 (footnotes omitted).

My difficulty with this reasoning stems from the fact that the Stennis Amendment is applicable not only to ESAA, but also to Title VI of the Civil Rights Act of 1964, and the latter has been construed to contain not a mere disparate-impact

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argument (namely, that a statutory provision should be construed in accordance with the majority of arguably related provisions), the Court's tally of these other provisions is extremely questionable. In short, it seems clear that the ineligibility standard of § 706 (d)(1)(A) does not, as the Court suggests, amount to an "effect" test. That provision by its own terms rather plainly requires at least a showing of negligence before a school district is rendered ineligible for ESAA funding.

standard, but a standard of intentional discrimination. In *University of California Regents* v. *Bakke*, 438 U. S. 265, five Members of the Court concluded that Title VI, which prohibits discrimination in federally funded programs, prohibits only discrimination violative of the Fifth Amendment and the Equal Protection Clause of the Fourteenth. *Id.*, at 281–287 (POWELL, J.); *id.*, at 328–355 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.). Those constitutional provisions, in turn, have been construed to reach only purposeful discrimination. *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U. S. 252; *Washington* v. *Davis*, 426 U. S. 229; *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189. It thus follows from *Bakke* that Title VI prohibits only purposeful discrimination.

It is wholly incongruous to hold in this case that the Stennis Amendment supports a mere "disparate impact" reading of the term "discrimination" in § 706 (d)(1)(B) of ESAA, when only two Terms ago five Members of the Court construed the prohibition against "discrimination" in federally funded programs under Title VI, which is equally subject to the Stennis Amendment, to incorporate a purposeful-discrimination test. If Congress in fact intended the Stennis Amendment to establish a uniform national standard prohibiting action leading to disparate racial impact, then it is difficult to understand why this standard should not govern Title VI as well as § 706 (d)(1)(B).[6]

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[6] In response, the Court argues that Congress enacted two different versions of the Stennis Amendment. *Ante*, at 146–147, n. 10. This argument is premised on the fact that the Conference Report indicated that § 703 (b), the section of the Stennis Amendment applicable to Title VI, was intended to restate and not to supersede a provision in Title VI, 42 U. S. C. § 2000d–6, which provides:

"(a) It is the policy of the United States that guidelines and criteria established pursuant to Title VI of the Civil Rights Act of 1964 . . . dealing with conditions of segregation by race, whether de jure or de facto, in

III

The conclusion that ineligibility under the second clause of § 706 (d)(1)(B) depends upon a showing of a school district's purposeful discrimination is persuasively supported by the interpretations that have been given to analogous provisions of Title VI and Title VII of the Civil Rights Act of 1964. When Congress enacted ESAA in 1972, it was not writing on a clean slate. To the contrary, when Congress left undefined the term "discrimination" in the second clause of § 706 (d)(1)(B), it had already enacted both Title VI of the 1964 Act, which provides that "[n]o person . . . shall . . . be subjected to *discrimination* under any program or activity receiving Federal financial assistance," [7] and § 703 (a)(1) of Title VII of that Act, which provides that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate* against any individual . . . because of such individual's race, color, religion, sex, or national origin." [8] These provisions are, in the absence of any explicit definition of "discrimination" in ESAA or its legislative history, a useful guide in determining what Congress intended when it concluded that school districts "engaged in discrimination" should be ineligible to receive ESAA funds.

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the schools of the local educational agencies of any State shall be applied *uniformly* in all regions of the United States whatever the origin or cause of such segregation.

"(b) *Such uniformity refers to one policy applied uniformly to de jure segregation wherever found and such other policy as may be provided pursuant to law applied uniformly to de facto segregation wherever found.*" (Emphasis added.)

The flaw in this argument is that the Conference Committee in no way indicated, as the Court seems to suggest, that § 703 (a), the section of the Stennis Amendment applicable to ESAA, was to be construed any differently than § 703 (b).

[7] 42 U. S. C. § 2000d (emphasis added).

[8] 42 U. S. C. § 2000e-2 (a)(1) (emphasis added).

Title VI and § 703 (a)(1) of Title VII point clearly toward the necessity of finding discriminatory motive or intent in order to hold a school district ineligible under the second clause of § 706 (d)(1)(B).[9] Title VI, as already pointed out, has been construed to prohibit only discrimination violative of the Fifth Amendment or the Equal Protection Clause of the Fourteenth, *University of California Regents* v. *Bakke*, 438 U. S., at 281–287 (POWELL, J.); *id.*, at 328–355 (BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ.); and, in turn, those constitutional provisions have been construed to prohibit only purposeful discrimination, *Dayton Board of Education* v. *Brinkman*, *supra*; *Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, *supra*; *Washington* v. *Davis*, *supra*; *Keyes* v. *School Dist. No. 1, Denver Colo.*, *supra*. And, in construing § 703 (a)(1) of Title VII, which, at its core, prohibits an employer from "treat[ing] some people less favorably than others because of their race, color, religion, sex, or national origin," *Teamsters* v. *United States*, 431 U. S. 324, 335, n. 15, we have held that "[p]roof of discriminatory motive is critical," *ibid.* Accord, *Furnco Construction Corp.* v. *Waters*, 438 U. S. 567, 579–580; *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 805, n. 18.[10]

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[9] There may be a difference between the standard of Title VI and that of § 703 (a)(1) of Title VII. But it is clear that a finding of discrimination under either provision ultimately depends upon a finding of either discriminatory motive or discriminatory intent.

[10] Because direct proof of an illicit motive is often unavailable, the cases under § 703 (a)(1) have established a procedural mechanism under which an employer, once an employee has adduced sufficient evidence to give rise to an inference of a discriminatory motive, must bear the burden of establishing that he acted for "a legitimate, non-discriminatory reason." If the employer meets that burden, then the employee must show that the proffered explanation is in fact a pretext. *Furnco Construction Corp.* v. *Waters*, 438 U. S., at 575–577; *Teamsters* v. *United States*, 431 U. S., at 357–360; *McDonnell Douglas Corp.* v. *Green*, 411 U. S., at 800–805. This procedural mechanism is simply designed to provide a means of inferring an employer's motive in the absence of direct evidence. See *Furnco Construction Corp.* v. *Waters*, *supra*.

If the term "discrimination" in § 706 (d)(1)(B) was in fact intended to mean something other than what it means under Title VI and § 703 (a)(1) of Title VII, Congress could have been expected to state the difference in explicit terms. Since there is no such expression of congressional intent, it follows that the meaning of the term "discrimination" under § 706 (d)(1)(B) should be no different from its established meaning under Title VI and § 703 (a)(1) of Title VII.[11]

For all these reasons, I respectfully dissent.

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[11] The Court finds support for its interpretation of § 706 (d)(1)(B) in the fact that Congress, though aware that HEW had construed the section to incorporate a disparate-impact test, re-enacted it without change in 1978. *Ante*, at 148–149. This inaction by Congress, in the Court's view, "strongly suggests that Congress acquiesced in HEW's interpretation of the statute." *Ante*, at 149.

This argument might have force if the Court today construed § 706 (d)(1)(B) the way HEW interpreted it in 1978. But the Court has not done so. The HEW regulation implementing § 706 (d)(1)(B) provides, as it did in 1978, that:

"No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees . . . , including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin." 45 CFR § 185.43 (b)(2).

By lumping together "demotions and dismissals," on the one hand, with employee "assignments," on the other, the HEW regulation rather clearly equates the ineligibility standard of the second clause of § 706 (d)(1)(B) with the irrebuttable disparate-impact standard of the first clause. By contrast, the Court says that the ineligibility standards under the two clauses substantially differ. *Ante*, at 143–144. Since the Court departs from HEW's 1978 interpretation of § 706 (d)(1)(B), it is hard to see how the failure of Congress to overturn that interpretation lends support to the Court's different construction of the section in its opinion today.

KAISER AETNA ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-738. Argued October 1, 1979—Decided December 4, 1979

Through dredging and filling operations in developing a marina-style subdivision community, petitioners, the owner and lessee of an area which included Kuapa Pond, a shallow lagoon on the island of Oahu, Hawaii, that was contiguous to a navigable bay and the Pacific Ocean but separated from the bay by a barrier beach, converted the pond into a marina and thereby connected it to the bay. The Army Corps of Engineers had advised petitioners that they were not required to obtain permits for the development of and operations in the pond, and petitioners ultimately made improvements that allowed boats access to and from the bay. Petitioner lessee controls access to and use of the pond, which, under Hawaii law, was private property, and fees are charged for maintaining the pond. Thereafter, the United States filed suit in Federal District Court against petitioners to resolve a dispute as to whether petitioners were required to obtain the Corps' authorization, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, for future improvements in the marina, and whether petitioners could deny the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States," subject to regulation by the Corps, but further held that the Government lacked authority to open the pond to the public without payment of compensation to the owner. The Court of Appeals agreed that the pond fell within the scope of Congress' regulatory authority, but held, reversing the District Court, that when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government, thus giving the public a right of access to what was once petitioners' private pond.

Held: If the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow the public free access to the dredged pond. Although the dredged pond falls within

the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, this Court has never held that the federal navigational servitude creates a blanket exception to the Takings Clause of the Fifth Amendment whenever Congress exercises its Commerce Clause authority to promote navigation. Congress, in light of its extensive Commerce Clause authority over this Nation's waters, which does not depend on a stream's "navigability," may prescribe rules governing petitioners' marina and may assure the public a free right of access to the marina if it so chooses, but whether a statute or regulation that goes so far amounts to a "taking" is an entirely separate question. Here the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation involved in typical riparian condemnation cases as to amount to a taking requiring just compensation. Cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393. Pp. 170–180.

584 F. 2d 378, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 180.

Richard Charles Bocken argued the cause for petitioners. With him on the briefs was *George Richard Morry*.

Kathryn A. Oberly argued the cause for the United States. With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, William Alsup, Raymond N. Zagone*, and *Martin Green*.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The Hawaii Kai Marina was developed by the dredging and filling of Kuapa Pond, which was a shallow lagoon separated from Maunalua Bay and the Pacific Ocean by a barrier beach. Although under Hawaii law Kuapa Pond was private property, the Court of Appeals for the Ninth Circuit held that

**Charles D. Marshall, Jr.*, filed a brief for the Louisiana Landowners Association, Inc., as *amicus curiae* urging reversal.

when petitioners converted the pond into a marina and thereby connected it to the bay, it became subject to the "navigational servitude" of the Federal Government. Thus, the public acquired a right of access to what was once petitioners' private pond. We granted certiorari because of the importance of the issue and a conflict concerning the scope and nature of the servitude.[1] 440 U. S. 906 (1979).

I

Kuapa Pond was apparently created in the late Pleistocene Period, near the end of the ice age, when the rising sea level caused the shoreline to retreat, and partial erosion of the headlands adjacent to the bay formed sediment that accreted to form a barrier beach at the mouth of the pond, creating a lagoon. It covered 523 acres on the island of Oahu, Hawaii, and extended approximately two miles inland from Maunalua Bay and the Pacific Ocean. The pond was contiguous to the bay, which is a navigable waterway of the United States, but was separated from it by the barrier beach.

Early Hawaiians used the lagoon as a fishpond and reinforced the natural sandbar with stone walls. Prior to the annexation of Hawaii, there were two openings from the pond to Maunalua Bay. The fishpond's managers placed removable sluice gates in the stone walls across these openings. Water from the bay and ocean entered the pond through the gates during high tide, and during low tide the current flow reversed toward the ocean. The Hawaiians used the tidal action to raise and catch fish such as mullet.

Kuapa Pond, and other Hawaiian fishponds, have always been considered to be private property by landowners and by the Hawaiian government. Such ponds were once an integral part of the Hawaiian feudal system. And in 1848 they were

[1] In the companion to this case, *Vaughn* v. *Vermilion Corp.*, *post*, p. 206, the Louisiana Court of Appeal held that privately constructed canals, connected to navigable waters of the United States, navigable in fact, and used for commerce, are not subject to the federal navigational servitude. 356 So. 2d 551, writ denied, 357 So. 2d 558 (1978).

allotted as parts of large land units, known as "ahupuaas," by King Kamehameha III during the Great Mahele or royal land division. Titles to the fishponds were recognized to the same extent and in the same manner as rights in more orthodox fast land. Kuapa Pond was part of an ahupuaa that eventually vested in Bernice Pauahi Bishop and on her death formed a part of the trust corpus of petitioner Bishop Estate, the present owner.

In 1961, Bishop Estate leased a 6,000-acre area, which included Kuapa Pond, to petitioner Kaiser Aetna for subdivision development. The development is now known as "Hawaii Kai." Kaiser Aetna dredged and filled parts of Kuapa Pond, erected retaining walls, and built bridges within the development to create the Hawaii Kai Marina. Kaiser Aetna increased the average depth of the channel from two to six feet. It also created accommodations for pleasure boats and eliminated the sluice gates.

When petitioners notified the Army Corps of Engineers of their plans in 1961, the Corps advised them they were not required to obtain permits for the development of and operations in Kuapa Pond. Kaiser Aetna subsequently informed the Corps that it planned to dredge an 8-foot-deep channel connecting Kuapa Pond to Maunalua Bay and the Pacific Ocean, and to increase the clearance of a bridge of the Kalanianaole Highway—which had been constructed during the early 1900's along the barrier beach separating Kuapa Pond from the bay and ocean—to a maximum of 13.5 feet over the mean sea level. These improvements were made in order to allow boats from the marina to enter into and return from the bay, as well as to provide better waters. The Corps acquiesced in the proposals, its chief of construction commenting only that the "deepening of the channel may cause erosion of the beach."

At the time of trial, a marina-style community of approximately 22,000 persons surrounded Kuapa Pond. It included approximately 1,500 marina waterfront lot lessees. The water-

front lot lessees, along with at least 86 nonmarina lot lessees from Hawaii Kai and 56 boatowners who are not residents of Hawaii Kai, pay fees for maintenance of the pond and for patrol boats that remove floating debris, enforce boating regulations, and maintain the privacy and security of the pond. Kaiser Aetna controls access to and use of the marina. It has generally not permitted commercial use, except for a small vessel, the *Marina Queen*, which could carry 25 passengers and was used for about five years to promote sales of marina lots and for a brief period by marina shopping center merchants to attract people to their shopping facilities.

In 1972, a dispute arose between petitioners and the Corps concerning whether (1) petitioners were required to obtain authorization from the Corps, in accordance with § 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U. S. C. § 403,[2] for future construction, excavation, or filling in the marina, and (2) petitioners were precluded from denying the public access to the pond because, as a result of the improvements, it had become a navigable water of the United States. The dispute foreseeably ripened into a lawsuit by the United States Government against petitioners in the United States

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[2] Title 33 U. S. C. § 403 provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

District Court for the District of Hawaii. In examining the scope of Congress' regulatory authority under the Commerce Clause, the District Court held that the pond was "navigable water of the United States" and thus subject to regulation by the Corps under § 10 of the Rivers and Harbors Appropriation Act. 408 F. Supp. 42, 53 (1976). It further held, however, that the Government lacked the authority to open the now dredged pond to the public without payment of compensation to the owner. *Id.*, at 54. In reaching this holding, the District Court reasoned that although the pond was navigable for the purpose of delimiting Congress' regulatory power, it was not navigable for the purpose of defining the scope of the federal "navigational servitude" imposed by the Commerce Clause. *Ibid.* Thus, the District Court denied the Corps' request for an injunction to require petitioners to allow public access and to notify the public of the fact of the pond's accessibility.

The Court of Appeals agreed with the District Court's conclusion that the pond fell within the scope of Congress' regulatory authority, but reversed the District Court's holding that the navigational servitude did not require petitioners to grant the public access to the pond. 584 F. 2d 378 (1978). The Court of Appeals reasoned that the "federal regulatory authority over navigable waters . . . and the right of public use cannot consistently be separated. It is the public right of navigational use that renders regulatory control necessary in the public interest." *Id.*, at 383. The question before us is whether the Court of Appeals erred in holding that petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude, thus converting into a public aquatic park that which petitioners had invested millions of dollars in improving on the assumption that it was a privately owned pond leased to Kaiser Aetna.[3]

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[3] Petitioners do not challenge the Court of Appeals' holding that the Hawaii Kai Marina is within the scope of Congress' regulatory power and

II

The Government contends that petitioners may not exclude members of the public from the Hawaii Kai Marina because "[t]he public enjoys a federally protected right of navigation over the navigable waters of the United States." Brief for United States 13. It claims the issue in dispute is whether Kuapa Pond is presently a "navigable water of the United States." *Ibid.* When petitioners dredged and improved Kuapa Pond, the Government continues, the pond—although it may once have qualified as fast land—became navigable water of the United States.[4] The public thereby acquired a right to use Kuapa Pond as a continuous highway for navigation, and the Corps of Engineers may consequently obtain an injunction to prevent petitioners from attempting to reserve the waterway to themselves.

The position advanced by the Government, and adopted by the Court of Appeals below, presumes that the concept of "navigable waters of the United States" has a fixed meaning that remains unchanged in whatever context it is being applied. While we do not fully agree with the reasoning of the District Court, we do agree with its conclusion that all of this Court's cases dealing with the authority of Congress to regulate navigation and the so-called "navigational servitude" cannot simply be lumped into one basket. 408 F. Supp., at

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subject to regulation by the Army Corps of Engineers pursuant to its authority under § 10 of the Rivers and Harbors Appropriation Act, 33 U. S. C. § 403.

[4] The Government further argues:

"The fact that the conversion was accomplished at private expense does not exempt Kuapa Pond from the navigable waters of the United States. To allow landowners to dredge their fast lands and reshape the navigable waters of the United States to more conveniently serve their land, and then to exclude the public from the navigable portions flowing over the site of former fast lands, would unduly burden navigation and commerce. The states lack the power under the Commerce Clause to sanction any such form of private property. . . ." Brief for United States 14–15.

48–49. As the District Court aptly stated, "any reliance upon judicial precedent must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Id.*, at 49.[5]

It is true that Kuapa Pond may fit within definitions of "navigability" articulated in past decisions of this Court. But it must be recognized that the concept of navigability in these decisions was used for purposes other than to delimit the boundaries of the navigational servitude: for example, to define the scope of Congress' regulatory authority under the Interstate Commerce Clause, see, *e. g.*, *United States* v. *Appalachian Power Co.*, 311 U. S. 377 (1940); *South Carolina* v. *Georgia*, 93 U. S. 4 (1876); *The Montello*, 20 Wall. 430 (1874); *The Daniel Ball*, 10 Wall. 557 (1871), to determine the extent of the authority of the Corps of Engineers under the Rivers and Harbors Appropriation Act of 1899,[6] and to

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[5] Petitioners contend that the term "navigable waters of the United States," which has been traditionally employed to identify water subject to federal regulation and admiralty jurisdiction, see *infra*, this page and 172, "is so inherently unworkable with regard to Hawaiian fish ponds that it does not represent a meaningful or equitable standard under which public and private rights may be determined." Pet. for Cert. 8. The efforts to distinguish "fast lands" from public rights in waterways subject to the navigational servitude, however, has been the subject of litigation for more than a century, and in the absence of something more unusual than the situation presented here it is the Hawaiian fishpond that must fit into the decisions of this Court, rather than the latter being tailored to exclude the fishpond.

[6] See, *e. g.*, *United States* v. *Republic Steel Corp.*, 362 U. S. 482 (1960) (deposit of industrial solids into river held to create an "obstruction" to the "navigable capacity" of the river forbidden by § 10 of the Rivers and Harbors Appropriation Act of 1899).

The Corps of Engineers has adopted the following general definition of "navigable waters":

"Navigable waters of the United States are those waters that are subject to the ebb and flow of the tide and/or are presently used, or have been used in the past, or may be susceptible for use to transport interstate or foreign commerce. A determination of navigability, once made, applies

establish the limits of the jurisdiction of federal courts conferred by Art. III, § 2, of the United States Constitution over admiralty and maritime cases.[7] Although the Government is clearly correct in maintaining that the now dredged Kuapa Pond falls within the definition of "navigable waters" as this Court has used that term in delimiting the boundaries of Congress' regulatory authority under the Commerce Clause, see, *e. g.*, *The Daniel Ball*, *supra*, at 563; *The Montello*, *supra*, at 441–442; *United States* v. *Appalachian Power Co.*, *supra*, at 407–408, this Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers, acting under the authority delegated it by Congress in the Rivers

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laterally over the entire surface of the waterbody, and is not extinguished by later actions or events which impede or destroy navigable capacity." 33 CFR § 329.4 (1978).

[7] "Navigable water" subject to federal admiralty jurisdiction was defined as including waters that are navigable in fact in *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443 (1852). See also, *e. g.*, *The Belfast*, 7 Wall. 624 (1869). And in *Ex parte Boyer*, 109 U. S. 629 (1884), this Court held that such jurisdiction extended to artificial bodies of water:

"Navigable water situated as this canal is, used for the purposes for which it is used, a highway for commerce between ports and places in different States, carried on by vessels such as those in question here, is public water of the United States, and within the legitimate scope of the admiralty jurisdiction conferred by the Constitution and statutes of the United States, even though the canal is wholly artificial, and is wholly within the body of a State, and subject to its ownership and control; and it makes no difference as to the jurisdiction of the district court that one or the other of the vessels was at the time of the collision on a voyage from one place in the State of Illinois to another place in that State." *Id.*, at 632.

Congress, pursuant to its authority under the Necessary and Proper Clause of Art. I to enact laws carrying into execution the powers vested in other departments of the Federal Government, has also been recognized as having the power to legislate with regard to matters concerning admiralty and maritime cases. *Butler* v. *Boston S. S. Co.*, 130 U. S. 527, 557 (1889). See also, *e. g.*, *In re Garnett*, 141 U. S. 1, 12 (1891).

and Harbors Appropriation Act, it does not follow that the pond is also subject to a public right of access.

A

Reference to the navigability of a waterway adds little if anything to the breadth of Congress' regulatory power over interstate commerce. It has long been settled that Congress has extensive authority over this Nation's waters under the Commerce Clause. Early in our history this Court held that the power to regulate commerce necessarily includes power over navigation. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189 (1824). As stated in *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725 (1866):

> "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress."

The pervasive nature of Congress' regulatory authority over national waters was more fully described in *United States* v. *Appalachian Power Co.*, *supra*, at 426–427:

> "[I]t cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. . . . In truth the authority of the United States is the regulation of commerce on its waters. Navigability . . . is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . . [The] authority is as broad as the needs of commerce. . . . The point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

Appalachian Power Co. indicates that congressional authority over the waters of this Nation does not depend on a stream's "navigability." And, as demonstrated by this Court's decisions in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1937), *United States* v. *Darby*, 312 U. S. 100 (1941), and *Wickard* v. *Filburn*, 317 U. S. 111 (1942), a wide spectrum of economic activities "affect" interstate commerce and thus are susceptible of congressional regulation under the Commerce Clause irrespective of whether navigation, or, indeed, water, is involved. The cases that discuss Congress' paramount authority to regulate waters used in interstate commerce are consequently best understood when viewed in terms of more traditional Commerce Clause analysis than by reference to whether the stream in fact is capable of supporting navigation or may be characterized as "navigable water of the United States." With respect to the Hawaii Kai Marina, for example, there is no doubt that Congress may prescribe the rules of the road, define the conditions under which running lights shall be displayed, require the removal of obstructions to navigation, and exercise its authority for such other reason as may seem to it in the interest of furthering navigation or commerce.

B

In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a "taking," however, is an entirely separate question.[8] *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 415 (1922). As was recently pointed out in *Penn Central Transportation Co.* v. *New York City*, 438 U. S. 104 (1978),

[8] Thus, this Court has observed that "[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title." *Chicago, R. I. & P. R. Co.* v. *United States*, 284 U. S. 80, 96 (1931).

this Court has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." *Id.*, at 124. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance. *Ibid.* When the "taking" question has involved the exercise of the public right of navigation over interstate waters that constitute highways for commerce, however, this Court has held in many cases that compensation may not be required as a result of the federal navigational servitude. See, *e. g., United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53 (1913).

C

The navigational servitude is an expression of the notion that the determination whether a taking has occurred must take into consideration the important public interest in the flow of interstate waters that in their natural condition are in fact capable of supporting public navigation. See *United States* v. *Cress*, 243 U. S. 316 (1917). Thus, in *United States* v. *Chandler-Dunbar Co., supra*, at 69, this Court stated that "the running water in a great navigable stream is [incapable] of private ownership. . . ." And, in holding that a riparian landowner was not entitled to compensation when the construction of a pier cut off his access to navigable water, this Court observed:

> "The primary use of the waters and the lands under them is for purposes of navigation, and the erection of piers in them to improve navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. Whatever the nature of the interest of

> a riparian owner in the submerged lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation." *Scranton* v. *Wheeler*, 179 U. S. 141, 163 (1900).

For over a century, a long line of cases decided by this Court involving Government condemnation of "fast lands" delineated the elements of compensable damages that the Government was required to pay because the lands were riparian to navigable streams. The Court was often deeply divided, and the results frequently turned on what could fairly be described as quite narrow distinctions. But this is not a case in which the Government recognizes any obligation whatever to condemn "fast lands" and pay just compensation under the Eminent Domain Clause of the Fifth Amendment to the United States Constitution. It is instead a case in which the owner of what was once a private pond, separated from concededly navigable water by a barrier beach and used for aquatic agriculture, has invested substantial amounts of money in making improvements. The Government contends that as a result of one of these improvements, the pond's connection to the navigable water in a manner approved by the Corps of Engineers, the owner has somehow lost one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.

Because the factual situation in this case is so different from typical ones involved in riparian condemnation cases, we see little point in tracing the historical development of that doctrine here. Indeed, since this Court's decision in *United States* v. *Rands*, 389 U. S. 121, 123 (1967), closely following its decisions in *United States* v. *Virginia Electric &*

Power Co., 365 U. S. 624, 628 (1961), and *United States* v. *Twin City Power Co.*, 350 U. S. 222, 226 (1956), the elements of compensation for which the Government must pay when it condemns fast lands riparian to a navigable stream have remained largely settled. Distinctions between cases such as these, on the one hand, and *United States* v. *Kansas City Life Ins. Co.*, 339 U. S. 799, 808 (1950), may seem fine, indeed, in the light of hindsight, but perhaps for the very reason that it *is* hindsight which we now exercise, the shifting back and forth of the Court in this area until the most recent decisions bears the sound of "Old, unhappy, far-off things, and battles long ago."

There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience. The navigational servitude, which exists by virtue of the Commerce Clause in navigable streams, gives rise to an authority in the Government to assure that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce. Thus, when the Government acquires fast lands to improve navigation, it is not required under the Eminent Domain Clause to compensate landowners for certain elements of damage attributable to riparian location, such as the land's value as a hydroelectric site, *Twin City Power Co.*, *supra*, or a port site, *United States* v. *Rands*, *supra*. But none of these cases ever doubted that when the Government wished to acquire fast lands, it was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest. See *United States* v. *Kansas City Life Ins. Co.*, *supra*, at 800; *United States* v. *Virginia Electric & Power Co.*,

supra, at 628; *United States* v. *Rands*, *supra*, at 123. The nature of the navigational servitude when invoked by the Government in condemnation cases is summarized as well as anywhere in *United States* v. *Willow River Co.*, 324 U. S. 499, 502 (1945):

> "It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion."

We think, however, that when the Government makes the naked assertion it does here, that assertion collides with not merely an "economic advantage" but an "economic advantage" that has the law back of it to such an extent that courts may "compel others to forbear from interfering with [it] or to compensate for [its] invasion." *United States* v. *Willow River Co.*, *supra*, at 502.

Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393 (1922). More than one factor contributes to this result.[9] It is clear that prior to its improvement, Kuapa Pond was incapable of being used as a continuous highway for the purpose of navigation in interstate commerce. Its maximum depth at high tide was a mere two feet, it was separated from the adjacent bay and ocean by a natural barrier beach, and its principal commercial value was limited to fishing.[10] It

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[9] We do not decide, however, whether in some circumstances one of these factors by itself may be dispositive.

[10] While it was still a fishpond, a few flat-bottomed shallow draft boats were operated by the fishermen in their work. There is no evidence, how-

consequently is not the sort of "great navigable stream" that this Court has previously recognized as being "[incapable] of private ownership." See, *e. g., United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 69; *United States* v. *Twin City Power Co., supra,* at 228. And, as previously noted, Kuapa Pond has always been considered to be private property under Hawaiian law. Thus, the interest of petitioners in the now dredged marina is strikingly similar to that of owners of fast land adjacent to navigable water.

We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot "estop" the United States, see *Montana* v. *Kennedy*, 366 U. S. 308, 314–315 (1961); *INS* v. *Hibi*, 414 U. S. 5 (1973), it can lead to the fruition of a number of expectancies embodied in the concept of "property"—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. In this case, we hold that the "right to exclude," so universally held to be a fundamental element of

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ever, that even these boats could acquire access to the adjacent bay and ocean from the pond.

Although Kuapa Pond clearly was not navigable in fact in its natural state, the dissent argue that the pond nevertheless was "navigable water of the United States" prior to its development because it was subject to the ebb and flow of the tide. *Post,* at 181, 183, 186. This Court has never held, however, that whenever a body of water satisfies this mechanical test, the Government may invoke the "navigational servitude" to avoid payment of just compensation irrespective of the private interests at stake.

the property right,[11] falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. Compare *Andrus* v. *Allard*, *ante*, at 65–66, with the traditional taking of fee interests in *United States ex rel. TVA* v. *Powelson*, 319 U. S. 266 (1943), and in *United States* v. *Miller*, 317 U. S. 369 (1943). And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation. See *United States* v. *Causby*, 328 U. S. 256, 265 (1946); *Portsmouth Co.* v. *United States*, 260 U. S. 327 (1922). Thus, if the Government wishes to make what was formerly Kuapa Pond into a public aquatic park after petitioners have proceeded as far as they have here, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

Accordingly the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court holds today that, absent compensation, the public may be denied a right of access to "navigable waters of the

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[11] See, *e. g.*, *United States* v. *Pueblo of San Ildefonso*, 206 Ct. Cl. 649, 669–670, 513 F. 2d 1383, 1394 (1975); *United States* v. *Lutz*, 295 F. 2d 736, 740 (CA5 1961). As stated by Mr. Justice Brandeis, "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *International News Service* v. *Associated Press*, 248 U. S. 215, 250 (1918) (dissenting opinion).

United States" that have been created or enhanced by private means. I find that conclusion neither supported in precedent nor wise in judicial policy, and I dissent.

My disagreement with the Court lies in four areas. First, I believe the Court errs by implicitly rejecting the old and long-established "ebb and flow" test of navigability as a source for the navigational servitude the Government claims. Second, I cannot accept the notion, which I believe to be without foundation in precedent, that the federal "navigational servitude" does not extend to all "navigable waters of the United States." Third, I reach a different balance of interests on the question whether the exercise of the servitude in favor of public access requires compensation to private interests where private efforts are responsible for creating "navigability in fact." And finally, I differ on the bearing that state property law has on the questions before us today.

I

The first issue, in my view, is whether Kuapa Pond is "navigable water of the United States," and, if so, why. The Court begins by asking "whether . . . petitioners' improvements to Kuapa Pond caused its original character to be so altered that it became subject to an overriding federal navigational servitude." *Ante*, at 169. It thus assumes that the only basis for extension of federal authority must have arisen *after* the pond was "developed" and transformed into a marina. This choice of starting point overlooks the Government's contention, advanced throughout this litigation, that Kuapa Pond was navigable water in its natural state, long prior to petitioners' improvements, by virtue of its susceptibility to the ebb and flow of the tide.[1]

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[1] The District Court found that "the Pacific tides ebbed and flowed over Kuapa Pond in its pre-marina state." 408 F. Supp. 42, 50 (Haw. 1976). The tide entered through two openings in the barrier beach; it also percolated through the barrier beach itself. *Id.*, at 46. Although

The Court concedes that precedent does not disclose a single criterion for identifying "navigable waters." I read our prior cases to establish three distinct tests: "navigability in fact," "navigable capacity," and "ebb and flow" of the tide. Navigability in fact has been used as a test for the scope of the dominant federal interest in navigation since *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How. 443, 457 (1852), and *The Daniel Ball*, 10 Wall. 557, 563 (1871). The test of navigable capacity is of more recent origin; it hails from *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 407–408 (1940), where it was used to support assertion of the federal navigational interest over a river nonnavigable in its natural state but capable of being rendered fit for navigation by "reasonable improvements." Ebb and flow is the oldest test of the three. It was inherited from England, where under common law it was used to define ownership of navigable waters by the Crown. In the early days of the Republic, it was regarded as the exclusive test of federal jurisdiction over the waterways of this country. See *The Thomas Jefferson*, 10 Wheat. 428, 429 (1825); *Waring* v. *Clarke*, 5 How. 441, 463–464 (1847).

Petitioners say that the ebb-and-flow test was abandoned in *The Propeller Genesee Chief* and *The Daniel Ball* in favor of navigability in fact. I do not agree with that interpretation. It is based upon language in those opinions suggesting that the test is "arbitrary," that it bears no relation to what is "suitable" for federal control, that it "has no application in this country," and indeed that it is not "any test at all." See *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How., at 454; *The Daniel Ball*, 10 Wall., at 563. One may acknowledge the language without accepting petitioners' inference. *The Propeller Genesee Chief* and *The Daniel Ball* were concerned with *extending* federal power to accommodate the stark realities of

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"[l]arge areas of land at the inland end were completely exposed at low tide," the entire pond was inundated at high tide. *Ibid.*

fresh-water commerce. In the former the question was whether admiralty jurisdiction included the Great Lakes. In the latter the question was the scope of federal regulatory power over navigation on a river. In either case it is not surprising that the Court, contemplating the substantial interstate fresh-water commerce on our lakes and rivers, found a test developed in England, an island nation with no analogue to our rivers and lakes, unacceptable as a test for the extent of federal power over these inland waterways. Cf. *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How., at 454–457. But the inadequacy of the test for defining the interior reach of federal power over navigation does not mean that the test must be, or must have been, abandoned for determining the breadth of federal power on our coasts.

The ebb-and-flow test is neither arbitrary nor unsuitable when applied in a coastwise setting. The ebb and flow of the tide define the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limits. Those natural limits encompass a water body such as Kuapa Pond, which is contiguous to Maunalua Bay, and which in its natural state must be regarded as an arm of the sea, subject to its tides and currents as much as the Bay itself.

I take it the Court must concede that, at least for regulatory purposes, the pond in its current condition is "navigable water" because it is now "navigable in fact." See *ante*, at 172. I would add that the pond was "navigable water" prior to development of the present marina because it was subject to the ebb and flow of the tide. In view of the importance the Court attaches to the fact of private development,[2]

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[2] The Court's opinion also embraces, distressingly for me, an implication that the *amount* of the private investment somehow influences the legal result. *Ante*, at 167, 169, and 180. I would think that the consequences

this alternative basis for navigability carries significant implications.[3]

II

A more serious parting of ways attends the question whether the navigational servitude extends to all "navigable waters of the United States," however the latter may be established.[4] The Court holds that it does not, at least where navigability is in whole or in part the work of private hands. I disagree.

The Court notes that the tests of navigability I have set forth originated in cases involving questions of federal regulation rather than application of the navigational servitude. *Ante*, at 171–173. It also notes that Congress has authority to regulate in aid of navigation far beyond the limitations of "navigability." *Ante*, at 173–174. From these indisputable propositions the Court concludes that "navigable waters" for these other purposes need not be the same as the "navigable waters" to which the navigational servitude applies.

Preliminarily, it must be recognized that the issue is *not* whether the navigational servitude runs to every watercourse over which the Federal Government may exercise its regula-

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would be the same whether the developer invested $100 or, as the Court stresses, *ante*, at 169, "millions of dollars."

[3] Essentially for the reasons stated by the District Court, 408 F. Supp., at 49–50, I stop short of agreeing with the Government's contention that the pond has been shown to be navigable under the *Appalachian Power* test. Although petitioners found it "reasonable" to deepen the pond for private development of the surrounding land, it does not follow that the same improvements would be equally "reasonable" if viewed solely in terms of benefits to navigational commerce.

[4] In addressing this question, we quickly may cast aside any distinction based on the qualifying phrase "of the United States." As prior cases demonstrate, this phrase is intended to draw the line between waters that may be navigated only intrastate, and those that are subject to navigation in interstate and foreign commerce. See, *e. g.*, *United States* v. *Utah*, 283 U. S. 64, 75 (1931); *The Daniel Ball*, 10 Wall. 557, 563 (1871). Since Kuapa Pond opens onto a bay of the Pacific Ocean, there can be no doubt that it may be navigated in interstate and foreign commerce.

tory power to promote navigation. Regulatory jurisdiction "in aid of" navigation extends beyond the navigational servitude, and indeed beyond navigable water itself. In *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U. S. 690, 707–710 (1899), for example, the Court confirmed the Federal Government's power to enjoin an irrigation project above the limits of navigable water on the Rio Grande River because that project threatened to destroy navigability below. But this is not such a case. Federal authority over Kuapa Pond does not stem solely from an effect on navigable water elsewhere, although this might be a sound alternative basis for regulatory jurisdiction. Instead, the authority arises because the pond itself is navigable water.

Nor does it advance analysis to suggest that we might decide to call certain waters "navigable" for some purposes, but "nonnavigable" for purposes of the navigational servitude. See *ante*, at 170–171. To my knowledge, no case has ever so held. Although tests of navigability have originated in other contexts, prior cases have never attempted to limit any test of navigability to a single species of federal power. Indeed, often they have referred to "navigable" water as "public" water. See, *e. g.*, *The Propeller Genesee Chief* v. *Fitzhugh*, 12 How., at 455, 457; *The Daniel Ball*, 10 Wall., at 563. In any event, to say that Kuapa Pond is somehow "nonnavigable" for present purposes, and that it is not subject to the navigational servitude for this reason, is merely to substitute one conclusion for another. To sustain its holding today, I believe that the Court must prove the more difficult contention that the navigational servitude does not extend to waters that are clearly navigable and fully subject to use as a highway for interstate commerce.

The Court holds, in essence, that the extent of the servitude does not depend on whether a waterway is navigable under any of the tests, but on whether the navigable waterway is "natural" or privately developed. In view of the fact that

Kuapa Pond originally was created by natural forces, and that its separation from the Bay has been maintained by the interaction of natural forces and human effort, neither characterization seems particularly apt in this case.[5] One could accept the Court's approach, however, and still find that the servitude extends to Kuapa Pond, by virtue of its status prior to development under the ebb-and-flow test. Nevertheless, I think the Court's reasoning on this point is flawed. In my view, the power we describe by the term "navigational servitude" extends to the limits of interstate commerce by water; accordingly, I would hold that it is coextensive with the "navigable waters of the United States."

As the Court recognizes, *ante*, at 174–175, the navigational servitude symbolizes the dominant federal interest in navigation implanted in the Commerce Clause. See *Scranton* v. *Wheeler*, 179 U. S. 141, 159–163 (1900); cf. *Gibbons* v. *Ogden*, 9 Wheat. 1, 189–190 (1824). To preserve this interest, the National Government has been given the power not only to regulate interstate commerce by water, but also to control the waters themselves, and to maintain them as "common highways, . . . forever free." See the Act of Aug. 7, 1789, 1 Stat. 50, 52, n. (a) (navigable waters in Northwest Territory). See *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62–64 (1913); *Gilman* v. *Philadelphia*, 3 Wall. 713, 724–725 (1866). The National Government is guardian of a public right of access to navigable waters of the United States. The navigational servitude is the legal formula by which we recognize the paramount nature of this governmental responsibility.

The Court often has observed the breadth of federal power in this context. In *United States* v. *Twin City Power Co.*, 350 U. S. 222 (1956), for example, it stated:

> "The interest of the United States in the flow of a navigable stream originates in the Commerce Clause.

[5] The natural and human contributions to the character of the pond are described by the District Court. See 408 F. Supp., at 46.

> That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called 'a dominant servitude' or 'a superior navigation easement.'" (Citations omitted.) *Id.*, at 224–225.

Perhaps with somewhat different emphasis, the Court also has stated, in cases involving navigable waters, that "the flow of the stream [is] in no sense private property," *United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 66, and that the waters themselves "are the public property of the nation." *Gilman* v. *Philadelphia*, 3 Wall., at 725.

The Court in *Twin City Power Co.* recognized that what is at issue is a matter of power, not of property. The servitude, in order to safeguard the Federal Government's paramount control over waters used in interstate commerce, limits the power of the States to create conflicting interests based on local law. That control does not depend on the form of the water body or the manner in which it was created, but on the fact of navigability and the corresponding commercial significance the waterway attains. Wherever that commerce can occur, be it Kuapa Pond or Honolulu Harbor, the navigational servitude must extend.

III

The conclusion that the navigational servitude extends to privately created or enhanced waters does not entirely dispose of this case. There remains the question whether the Government's resort to the servitude requires compensation for private investment instrumental in effecting or improving navigability. The Court, of course, concludes that there is no navigational servitude and, accordingly, that assertion of public access constitutes a compensable taking. Because I do not agree with the premise, I cannot conclude that the right to

compensation for opening the pond to the public is a necessary result. Nevertheless, I think this question requires a balancing of private and public interests.

Ordinarily, "[w]hen the Government exercises [the navigational] servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, 808 (1950). See also *United States* v. *Willow River Co.*, 324 U. S. 499, 509–510 (1945); *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 87–88 (1913); *Gibson* v. *United States*, 166 U. S. 269, 276 (1897). The Court's prior cases usually have involved riparian owners along navigable rivers who claim losses resulting from the raising or lowering of water levels in the navigable stream, or from the construction of artificial aids to navigation, such as dams or locks. In these cases the Court has held that no compensation is required for loss in water power due to impairment of the navigable water's flow, *e. g.*, *United States* v. *Twin City Power Co.*, 350 U. S., at 226–227; *United States* v. *Chandler-Dunbar Co.*, 229 U. S., at 65–66; for loss in "head" resulting from raising the stream, *United States* v. *Willow River Co.*, 324 U. S., at 507–511; for damage to structures erected between low- and high-water marks, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 595–597 (1941); for loss of access to navigable water caused by necessary improvements, *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 390–391 (1945); *Scranton* v. *Wheeler*, 179 U. S., at 163; or for loss of value to adjoining land based on potential use in navigational commerce, *United States* v. *Rands*, 389 U. S. 121, 124–125 (1967). The Court also has held that no compensation is required when "obstructions," such as bridges or wharves, are removed or altered to improve navigation, despite their obvious commercial value to those who erected them, and despite the Federal Government's original willingness to have them built. See, *e. g.*, *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 256, 258–264

(1915); *Union Bridge Co.* v. *United States*, 204 U. S. 364, 400 (1907).[6]

These cases establish a key principle that points the way for decision in the present context. In most of them, the non-compensable loss was related, either directly or indirectly, to the riparian owner's "access to, and use of, navigable waters." *United States* v. *Rands*, 389 U. S., at 124–125. However that access or use may have been turned to account for personal gain, and no matter how much the riparian owner had invested to enhance the value, the Court held that these rights were

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[6] There have been cases where compensation was required for private investment in improvement of navigation. Petitioners place particular reliance on *Monongahela Navigation Co.* v. *United States*, 148 U. S. 312 (1893). In that case, a private company had constructed locks and dams along the Monongahela River in order to improve its navigability. The company acted under express authority from the State of Pennsylvania, and at the invitation of the United States. Subsequently, Congress authorized the purchase or condemnation of one lock and dam in connection with a project to improve the upper waters of the river. Congress did not authorize compensation for the right to collect tolls. The Court emphasized the Government's role in encouraging the project, and held that, in consequence, "it does not lie in the power of . . . the United States to say that such lock and dam are an obstruction and wrongfully there, or that the right to compensation for the use of this improvement by the public does not belong to its owner, the Navigation Company." *Id.*, at 335. Subsequent decisions have limited *Monongahela Navigation Co.* to this rationale. See *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89 (1913); *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S., at 265; cf. *United States* v. *Rands*, 389 U. S. 121, 126 (1967).

There is a striking difference between *Monongahela Navigation Co.* and this case. Although the Army Corps of Engineers originally may have acquiesced in the improvement of Kuapa Pond, it did not invite or actively encourage the development for the benefit of public navigation. The difference is significant. In *Monongahela Navigation Co.* the United States was required to compensate for the commercial value of navigational improvements it had promoted. In this case, in order to maintain uniformly free navigation, the Government now must compensate for improvements it might not have undertaken if it were at liberty independently to assess the advisability of opening the pond to navigation.

shared with the public at large. Actions taken to improve their value for the many caused no reimbursable damage to the few who, by the accident of owning contiguous "fast land," previously enjoyed the blessings of the common right in greater measure. See, *e. g.*, *United States* v. *Commodore Park, Inc.*, 324 U. S., at 390–391. The Court recognized that encroachment on rights inhering separately in the adjoining "fast land," *United States* v. *Virginia Electric Co.*, 365 U. S. 624, 628 (1961), or resulting from access to *nonnavigable* tributaries, see *United States* v. *Cress*, 243 U. S. 316 (1917), might form the basis for a valid compensation claim. But the principal distinction was that these compensable values had nothing to do with use of the navigable water.

Application of this principle to the present case should lead to the conclusion that the developers of Kuapa Pond have acted at their own risk and are not entitled to compensation for the public access the Government now asserts. See *Union Bridge Co.* v. *United States*, 204 U. S., at 400. The chief value of the pond in its present state obviously is a value of access to navigable water. Development was undertaken to improve and enhance this value, not to improve the value of the pond as some aquatic species of "fast land."[7] Petitioners do not question the Federal Government's plenary control over the waters of the Bay, and they have no vested right in access to its open water. Since the value of the pond and the motive for improving it lie in access to a highway of commerce, I am drawn to the conclusion that the petitioners' interest in the improved waters of the pond is not subject to compensation. Whatever expectancy petitioners may have had in control over the pond for use as a fishery was surrendered in exchange for

[7] I need not reach the question whether petitioners could have been compensated for the value of the pond as a fishery if the Government had decided, prior to development of Hawaii Kai, either to cut off access to the Bay or to dredge the pond. But cf. *United States* v. *Commodore Park, Inc.*, 324 U. S. 386, 390 (1945); *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82 (1913).

the advantages of access when they cut a channel into the Bay.

In contrast, the Government's interest in vindicating a public right of access to the pond is substantial. It is the very interest in maintaining "common highways, . . . forever free." After today's decision, it is open to any developer to claim that private improvements to a waterway navigable in interstate commerce have transformed "navigable water of the United States" into private property, at least to the extent that he may charge for access to the portion improved. Such appropriation of navigable waters for private use directly injures the freedom of commerce that the navigational servitude is intended to safeguard. In future cases, of course, the Army Corps of Engineers may alleviate this danger by conditioning permission for connection with other waterways on a right of free public access. But it seems to me that the inevitable result of today's decision is the introduction of new legal uncertainty in a field where I had thought the "battles long ago," *ante,* at 177, had achieved some settled doctrine.

IV

I come, finally, to the question whether Kuapa Pond's status under state law ought to alter this conclusion drawn from federal law. The Court assumes, without much discussion, that Kuapa Pond is the equivalent of "fast land" for purposes of Hawaii property law. There is, to be sure, support for this assumption, and for present purposes I am prepared to follow the Court in making it. See, *e. g., In re Application of Kamakana,* 58 Haw. 632, 574 P. 2d 1346 (1978). Nonetheless, I think it clear that local law concerns rights of title and use between citizen and citizen, or between citizen and state, but does not affect the scope or effect of the federal navigational servitude.

The rights in Kuapa fisheries that have been part of Hawaii law since the Great Mahele are not unlike the right to the use of the floor of a bay that was at issue in *Lewis Blue Point*

Oyster Co. v. *Briggs*, 229 U. S. 82 (1913). There the Court found no entitlement to compensation for destruction of an oysterbed in the course of dredging a channel. The Court reasoned: "If the public right of navigation is the dominant right and if, as must be the case, the title of the owner of the bed of navigable waters holds subject absolutely to the public right of navigation, this dominant right must include the right to use the bed of the water for every purpose which is in aid of navigation." *Id.*, at 87. By similar logic, I do not think Hawaii or any other State is at liberty through local law to defeat the navigational servitude by transforming navigable water into "fast land." Instead, state-created interests in the waters or beds of such navigable water are secondary to the navigational servitude. Thus, I believe this case should be decided purely as a matter of federal law, in which state law cannot control the scope of federal prerogatives.

For all of the foregoing reasons, the judgment of the Court of Appeals was correct. I therefore dissent.

FERRI *v.* ACKERMAN

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 78-5981. Argued October 2, 1979—Decided December 4, 1979

A Federal District Court, pursuant to the Criminal Justice Act of 1964, appointed respondent attorney to represent petitioner, an indigent defendant, in a federal criminal trial. After petitioner was convicted and pending his unsuccessful appeal, he sued respondent in a Pennsylvania state court for alleged malpractice in respondent's conduct of the federal criminal trial. The trial court dismissed the complaint on the ground that respondent was immune from liability. The Pennsylvania Supreme Court affirmed, resting its decision on federal law and holding that the justification for judicial immunity embraced in the federal system and encompassing prosecutors and grand jurors, as well as judges, was equally applicable to defense counsel as participants in judicial proceedings.

Held: An attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client. Pp. 199–205.

(a) There is nothing in the language, the legislative history, or the basic purpose of the Criminal Justice Act of 1964 in providing compensation for court-appointed attorneys to support the conclusion that Pennsylvania must accept respondent's claim of immunity from liability for a state tort. The fact that respondent was compensated from federal funds is not a sufficient basis for inferring that Congress intended to grant him immunity from malpractice suits. Pp. 199–201.

(b) The primary rationale for granting immunity to judges, prosecutors, and other public officials—namely, the societal interest in providing such officials with the maximum ability to deal fearlessly and impartially with the public at large—does not apply to court-appointed defense counsel sued for malpractice by his own client. In contrast to other officers of the court, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client, and, indeed, an indispensable element

of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. Pp. 202–204.

483 Pa. 90, 394 A. 2d 553, reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Julian N. Eule, by appointment of the Court, 440 U. S. 970, argued the cause and filed briefs for petitioner.

John P. Arness argued the cause for respondent. With him on the brief were *David J. Hensler*, *Allen R. Snyder*, and *Ned J. Nakles*.*

MR. JUSTICE STEVENS delivered the opinion of the Court.

The question is whether an attorney appointed by a federal judge to represent an indigent defendant in a federal criminal trial is, as a matter of federal law, entitled to absolute immunity in a state malpractice suit brought against him by his former client.

On August 28, 1974, a federal grand jury for the Western District of Pennsylvania named petitioner as a defendant in five counts of a nine-count federal indictment alleging that he had participated in a 1971 conspiracy to construct and use a bomb in violation of various federal statutes.[1] In due course, the District Court appointed respondent to serve as petitioner's counsel pursuant to the Criminal Justice Act of 1964.[2] Respondent represented petitioner during pretrial pro-

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Benjamin Lerner, *Douglas Riblet*, and *Howard B. Eisenberg* filed a brief for the National Legal Aid and Defender Association as *amicus curiae* urging reversal.

Dante G. Bertani filed a brief for the Committee of Pennsylvania Public Defenders as *amicus curiae* urging affirmance.

[1] The relevant sections, codified in the Criminal Code and the Internal Revenue Code, are: 18 U. S. C. §§ 2, 371, 844 (i); 26 U. S. C. §§ 5821, 5822, 5861, 5871.

[2] 18 U. S. C. § 3006A. The record indicates that petitioner had previously been represented by two other lawyers. An action against the first

ceedings and a 12-day trial. The jury found petitioner guilty on all counts; the judge imposed a sentence of 20 years on the conspiracy and bombing counts and an additional 10 years on the counts charging violations of the Internal Revenue Code. The judgments of conviction were affirmed summarily by the Court of Appeals for the Third Circuit.[3]

While that appeal was pending, on March 4, 1976, petitioner filed a "complaint in negligence" against respondent in the Court of Common Pleas for Union County, Pa.[4] The complaint described 67 different instances of alleged malpractice in respondent's conduct of the federal criminal trial and prayed for the recovery of substantial pecuniary damages.[5] Respondent filed a demurrer, asserting that the complaint failed to state a cause of action and that respondent was immune from any civil liability arising out of his conduct of petitioner's defense.

Petitioner thereafter filed a "Traversal Brief" in which he argued that the sufficiency of the malpractice complaint was supported by various sections of the Pennsylvania Rules of Civil Procedure and the Pennsylvania Constitution.[6] In that brief petitioner added a claim that respondent had negligently

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for malpractice is still pending; the second was permitted to withdraw when respondent was appointed to represent petitioner.

[3] *United States* v. *Ferri*, 546 F. 2d 419 (1976).

[4] Because venue was improper, the case was later transferred to the Court of Common Pleas for Westmoreland County.

[5] The prayer is somewhat ambiguous. For example, in one paragraph, petitioner, suing on behalf of his former wife as well as himself, asked for "double and contingent damages sustained as a direct result from the expenditure of funds and anxieties endured in the amount of Six Hundred Thousand Dollars ($6,000,000.oo) [*sic*] jointly and or severally as compensation for all." App. 20. His former wife, however, wrote to the clerk demanding that she be withdrawn as a plaintiff in what she characterized as "an abhorrent action." *Id.*, at 23.

[6] See *id.*, at 31.

failed to plead the statute of limitations as a bar to the Internal Revenue Code counts of the indictment.[7]

Without ruling on its sufficiency, the Court of Common Pleas, sitting en banc, dismissed the complaint on the ground that decided cases and strong public policy required that a lawyer appointed to represent an indigent defendant in a federal trial must be immune from liability for damages. The court cited one Pennsylvania case [8] but relied primarily on federal authorities for its conclusion.[9] By a divided vote, the Pennsylvania Supreme Court affirmed the order of dismissal, squarely resting its decision on federal law.

Because the case concerned a claim of immunity by a participant in a federal proceeding, the Pennsylvania Supreme Court believed that it was required to look to federal law to determine whether immunity exists and, if so, its nature and

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[7] Petitioner's claim is that the 3-year statute of limitations contained in 26 U. S. C. § 6531 applies to the Internal Revenue Code counts. A 5-year period applies to the other counts. 18 U. S. C. § 3282. According to the indictment, the bombing occurred on August 26, 1971. The indictment was filed on August 28, 1974. Absent any tolling, petitioner asserts that the Internal Revenue Code counts were therefore time barred. Because of the failure by respondent (or either of petitioner's two previous lawyers, see n. 2, *supra*) to plead the statute of limitations prior to trial, petitioner may be subject to an additional 10 years in prison. The Court of Appeals for the Third Circuit rejected the statute-of-limitations argument in its unpublished order, since it was raised for the first time on appeal. See App. 39. It is our understanding that the validity of the additional 10-year sentence has not yet been determined in any collateral proceeding.

[8] *Reese* v. *Danforth*, Lancaster County, 131 June Term, 1976, aff'd *per curiam*, 241 Pa. Super. 604, 360 A. 2d 629 (1976) (holding county public defenders immune from state malpractice suits). That case was reversed by the Supreme Court of Pennsylvania after we heard oral argument in this case. 486 Pa. 479, 406 A. 2d 735 (1979).

[9] The court also declined to rule on respondent's contention that the state court had no jurisdiction in an action based on ineffective assistance of counsel in a federal court because that issue could be raised on direct appeal in the criminal case or by way of collateral attack on the conviction. See App. 42.

scope.[10] After reviewing federal cases holding that the common-law doctrine of judicial immunity has been embraced in the federal system and encompasses prosecutors and grand jurors as well as judges, the court concluded that the justification for the immunity—the concern that the threat of harassment by unfounded litigation might impair the public officer's performance of his official duties—was equally applicable to defense counsel as participants in judicial proceedings. The court held that the privilege was absolute and therefore applied even to a claim of gross negligence and even though the allegation of malpractice did not concern an exercise of counsel's discretion.

The two dissenting justices agreed that federal law was applicable, but regarded appointed counsel as more analogous to privately retained counsel than to a federal officer such as a prosecutor. Because those who can afford to retain counsel of their own choosing have a remedy for malpractice, the dissenters felt that the denial of a comparable remedy for the indigent would establish a lower standard of care for appointed counsel.

The narrow issue presented to this Court is whether federal law in any way pre-empts the freedom of a State to decide the question of immunity in this situation in accord with its own law. We are not concerned with the elements of a state cause of action for malpractice and need not speculate about

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[10] "Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope. *Howard v. Lyons*, 360 U. S. 593 . . . (1959). *See also Carter v. Carlson*, 144 U. S. App. D. C. 388, 391–392, 447 F. 2d 358, 361–62 n. 5 (1971); *Chandler v. O'Bryan*, 445 F. 2d 1045, 1055 (10th Cir. 1971); *Garner v. Rathburn*, 346 F. 2d 55, 56 (10th Cir. 1965). As noted by the United States Supreme Court in *Howard v. Lyons*, *supra*, the very nature of a ruling of privilege requires reference to the law of the sovereign creating it for a determination of its nature and scope." 483 Pa. 90, 93, 394 A. 2d 553, 555 (1978).

whether a state court would consider petitioner's allegations sufficient to establish a breach of duty or a right to recover damages.[11] Nor are we concerned with the question whether Pennsylvania may conclude as a matter of state law that respondent is absolutely immune.[12] For when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law. U. S. Const., Art. VI, cl. 2.

For the purposes of our analysis, it is appropriate to assume that petitioner is entitled to prevail as a matter of state law, and to ask whether federal law requires a State to accept respondent's defense of absolute immunity. We may begin the inquiry by noting that there are separate federal interests that arguably could support the application of a separate federal rule in cases of this kind. A federal statute provided the basis for respondent's appointment and compensation, and he participated in a federal judicial proceeding as an "officer" of the federal court. The identification of those federal interests does not, however, demonstrate that an applicable federal rule of law has been adopted by Congress or recognized by this Court.[13] We therefore must consider whether respondent's immunity claim is supported by (1) the enactment of the Criminal Justice Act of 1964 or (2) our cases considering the immunity of federal officers for the performance of their assigned duties.

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[11] Cf. *Walker* v. *Kruse*, 484 F. 2d 802 (CA7 1973).

[12] See *Reese* v. *Danforth*, 486 Pa. 479, 406 A. 2d 735 (1979); n. 8, *supra*.

[13] When federal law is the source of the plaintiff's claim, there is a federal interest in defining the defenses to that claim, including the defense of immunity. See, *e. g.*, *Lake Country Estates* v. *Tahoe Regional Planning Agency*, 440 U. S. 391, 404; *Imbler* v. *Pachtman*, 424 U. S. 409, 417–419; *Pierson* v. *Ray*, 386 U. S. 547, 554; *Tenney* v. *Brandhove*, 341 U. S. 367, 376. That interest, of course, is not present in a case, such as this, arising under state law.

I

The Criminal Justice Act of 1964 was enacted to provide compensation for attorneys appointed to represent indigent defendants in federal criminal trials.[14] In response to evidence that unpaid appointed counsel were sometimes less diligent or less thorough than retained counsel,[15] Congress concluded that reasonable compensation would improve the quality of the representation of indigents. Although it might well have been suggested that a statutory immunity would be helpful in inducing counsel to accept representation of indigent defendants, there is nothing in the statute itself or in its legislative history to indicate that Congress ever considered—much less actually intended to implement—any such suggestion. Indeed, Congress' attempt to minimize the differences between retained and appointed counsel[16] is

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[14] As amended in 1970, the rates of compensation are $30 per hour for time expended in court and $20 per hour for time reasonably expended out of court (or the minimum hourly rate established by a bar association in the district, whichever is lower), plus reimbursement for expenses reasonably incurred. The maximum compensation may not exceed $1,000 for an attorney in a felony case or $400 where only misdemeanors are charged. 18 U. S. C. §§ 3006A (d)(1), (2).

[15] See H. R. Rep. No. 864, 88th Cong., 1st Sess., 6 (1963); S. Rep. No. 346, 88th Cong., 1st Sess., 2 (1963); 110 Cong. Rec. 454 (1964) (remarks of Rep. Fraser); Hearings on S. 63 et al. before the Senate Judiciary Committee, 88th Cong., 1st Sess., 249 (1963).

[16] Congress clearly wanted appointed counsel to share as much of retained counsel's characteristic independence from the Government as was possible notwithstanding the Government subsidy. This is borne out by the debate over whether to include the establishment of full-time public defender offices in the original bill. The Senate version provided for public defenders. The House bill did not, at least partly out of fear that full-time public defenders would be too closely identified with the Government's efforts to separate the guilty from the innocent, and that there would be a risk of institutional reluctance adequately to defend the guilty. See 110 Cong. Rec. 18558 (1964) (remarks of Rep. Moore, author of the bill):

"The Senate bill, in addition to authorizing the appointment of private

more consistent with the view that Congress intended all defense counsel to satisfy the same standards of professional responsibility and to be subject to the same controls.[17]

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counsel, would have empowered the Federal Government to establish Federal public defender offices in any or all of the judicial districts throughout the country. This would have had the effect of placing the administration of justice totally in the hands of the Federal Government. An individual, accused of a crime, would have been tried before a Federal judge, prosecuted by a Federal district attorney, and defended by a Federal public defender. Thus, the total right to a fair trial and to the preservation of one's right to liberty would be solely dependent upon men appointed by the Federal Government and compensated out of the Federal Treasury.

"This condition could easily have led to the establishment of totalitarian justice with the well-known unfairness and inequities found in totalitarian states. In addition, this condition could have severely undermined the duties and responsibilities of members of the bar who I believe are under an obligation to defend individuals, even those without funds and even [those] charged in an unpopular cause. The burdens of preserving a healthy society have been gradually eroded in recent years through too great a dependence upon the Federal Government. It did not seem desirable to a majority of the Members of the House to further this erosion. The House bill, then, adopted a philosophy totally different from that reported in the Senate."

See also *id.*, at 445 (remarks of Rep. Moore); *id.*, at 455 (remarks of Rep. McCulloch); Hearings on H. R. 1027 et al. before Subcommittee No. 5 of the House Judiciary Committee, 88th Cong., 1st Sess., 110 (1963).

The House view prevailed at the conference, and the 1964 version of the Act contained no provision for public defenders. In 1970, after a study of the need for public defenders, particularly in the larger districts, Congress amended the Criminal Justice Act to permit the establishment of public defenders to supplement individual appointments of defense counsel. We have found nothing in the legislative history of the 1970 amendments that indicates Congress intended public defenders to be immune from malpractice actions.

[17] As THE CHIEF JUSTICE noted several years ago, "defense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger, Counsel for the Prosecution and Defense—Their Roles

The fact that federal funds provided the source of respondent's compensation is not a sufficient basis for inferring that Congress intended to grant him immunity from malpractice suits. Countless private citizens are the recipients of federal funds of one kind or another, but Congress surely did not intend that all such recipients would be immune for actions taken in the course of expending those funds.

In sum, we find nothing in the express language, the history, or the basic purpose of the Criminal Justice Act of 1964 to support the conclusion that Pennsylvania must accept respondent's claim of immunity from liability for a state tort.

Under the Minimum Standards, 8 Am. Crim. L. Q. 2, 6 (1969). See also ABA Project on Standards for Criminal Justice, Defense Function § 3.9 (App. Draft 1971).

Respondent argues that there are valid policy reasons that justify an immunity for appointed counsel not accorded privately retained counsel. The claim is that a defendant's relationship with appointed counsel is substantially different than it would be with retained counsel because of the inability to choose and freely to discharge counsel. See, *e. g.*, Criminal Justice Act Plan for the Western District of Pennsylvania § IV A (3). The defendant would therefore tend to perceive appointed counsel as a representative of the government and to view him with suspicion. After conviction, a defendant's inevitable bitterness would lead to a high risk of retaliatory lawsuits, the same fear that underlies immunity for judges and prosecutors. *Butz* v. *Economou*, 438 U. S. 478, 510. Further, because of the increased risk of malpractice actions, appointed counsel would be more susceptible to pressure from clients to call additional witnesses or to make additional arguments that would in fact prejudice the defendant's own case. But respondent has not directed our attention to any empirical data—in judicial decisions, legislative hearings, or scholarly studies—to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. Given the speculative, though not implausible, nature of respondent's arguments, we are unwilling to ascribe to Congress an intent to accord an immunity to appointed counsel not given retained counsel in the face of the silent legislative history on this point.

II

Without relying on an explicit statutory grant of immunity, this Court has held that various federal officers, such as a captain in the United States Navy and the Postmaster General,[18] are entitled to immunity from liability for certain claims arising out of the performance of their official duties. The immunity recognized in those cases may be appropriately characterized as an incident of the federal office.

In a sense, a lawyer who is appointed to represent an indigent defendant in a federal judicial proceeding is also a federal officer. Since other federal officers—the judge, the prosecutor, and the grand jurors—enjoy immunity by virtue of their office, arguably that immunity should be shared by appointed counsel. There is, however, a marked difference between the nature of counsel's responsibilities and those of other officers of the court.[19] As public servants, the prose-

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[18] *Howard* v. *Lyons*, 360 U. S. 593; *Spalding* v. *Vilas*, 161 U. S. 483; *Kendall* v. *Stokes*, 3 How. 87.

[19] Writing for the Court in *In re Griffiths*, 413 U. S. 717, 728–729, MR. JUSTICE POWELL responded to the argument that a lawyer is comparable to other holders of governmental office as follows:

"We note at the outset that this argument goes beyond the opinion of the Connecticut Supreme Court, which recognized that a lawyer is not an officer in the ordinary sense. 162 Conn. [249,] 254, 294 A. 2d [281,] 283 [(1972)]. This comports with the view of the Court expressed by Mr. Justice Black in *Cammer* v. *United States*, 350 U. S. 399 (1956):

" 'It has been stated many times that lawyers are "officers of the court." One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an "officer" within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word "officer" as it has always been applied to lawyers conveys quite a different meaning from the word "officer" as applied to people serving as officers

cutor and the judge represent the interest of society as a whole. The conduct of their official duties may adversely affect a wide variety of different individuals, each of whom may be a potential source of future controversy. The societal interest in providing such public officials with the maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity.[20] The point of immunity for such

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within the conventional meaning of that term.' *Id.*, at 405 (footnote omitted)."

[20] As Mr. Justice Harlan wrote in his opinion in *Barr* v. *Matteo*, 360 U. S. 564, 571–572:

"The reasons for the recognition of the privilege have been often stated. It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government. The matter has been admirably expressed by Judge Learned Hand:

" 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end

officials is to forestall an atmosphere of intimidation that would conflict with their resolve to perform their designated functions in a principled fashion.

In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently.[21] The primary rationale for granting immunity to judges, prosecutors, and other public officers does not apply to defense counsel sued for malpractice by his own client.[22]

It may well be true, as respondent argues, that valid policy reasons might justify an immunity for appointed counsel that need not be accorded to privately retained counsel. See n. 17, *supra*. Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent

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better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation. . . .' *Gregoire* v. *Biddle*, 177 F. 2d 579, 581."

[21] There is no claim that retained counsel are rendered immune from malpractice actions by virtue of their participation in federal criminal trials.

[22] Our discussion is confined to immunity in malpractice actions. We do not address the question whether defense counsel is immune from other kinds of tort suits such as a defamation action brought by someone other than his client. Cf. *Butz* v. *Economou*, 438 U. S., at 512 (dictum).

counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important work. Whether a sufficient need can be demonstrated that would justify such a rule, or whether such a problem might be better remedied by adjusting the level of compensation, are questions that can most appropriately be answered by a legislative body acting on the basis of empirical data. Therefore we do not evaluate those arguments. Having concluded that the essential office of appointed defense counsel is akin to that of private counsel and unlike that of a prosecutor, judge, or naval captain, we also conclude that the federal officer immunity doctrine explicated in cases like *Howard* v. *Lyons*, 360 U. S. 593, and *Butz* v. *Economou*, 438 U. S. 478, is simply inapplicable in this case. Accordingly, without reaching any question concerning the power of Congress to create immunity, we hold that federal law does not now provide immunity for court-appointed counsel in a state malpractice suit brought by his former client.

The judgment of the Supreme Court of Pennsylvania is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

VAUGHN ET AL. *v.* VERMILION CORP.

CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT

No. 77-1819. Argued October 1, 1979—Decided December 4, 1979

Respondent, the lessee of land traversed by manmade navigable canals entering other naturally navigable waterways, filed suit in a Louisiana state court seeking permanent injunctions against petitioners from trespassing on the land and making use of the canals. Petitioners contended that notwithstanding respondent's property rights, they were entitled as a matter of federal law—without obtaining respondent's permission—to enter the property, travel the canals, and engage in commercial fishing and shrimping activities. The trial court entered summary judgment for respondent, and the Louisiana Court of Appeal affirmed.

Held: While the public has no general right of use of channels built on private property and with private funds in such a manner that they ultimately join with other navigable waterways, *Kaiser Aetna* v. *United States*, *ante*, p. 164, nevertheless if petitioners prove their allegations that respondent's system of artificial waterways destroyed the navigability of surrounding natural waterways, it cannot be said as a matter of law that such proof would not constitute a defense under federal law to respondent's prayer for injunctive relief.

356 So. 2d 551, affirmed in part, vacated in part, and remanded.

John K. Hill, Jr., argued the cause and filed a brief for petitioners.

Harry McCall, Jr., argued the cause for respondent. With him on the brief were *Charles R. Sonnier* and *Silas B. Cooper, Jr.**

**Solicitor General McCree, Assistant Attorney General Moorman, Louis F. Claiborne, William Alsup, Raymond N. Zagone, Jacques B. Gelin*, and *Martin Green* filed a brief for the United States as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *John A. Mmahat* and *Peter E. Duffy* for the Louisiana Department of Wildlife and Fisheries; by *Charles D. Marshall, Jr.*, for the Louisiana Landowners Association,

PER CURIAM.

The legal principles stated today in our opinion in *Kaiser Aetna* v. *United States, ante,* p. 164, control the disposition of this case. Because of its posture here, however, we find it necessary to remand the case to the Court of Appeal of Louisiana. We think a brief statement of the facts and proceedings below will be helpful to an understanding of our disposition.

Respondent Vermilion Corp. leases a substantial amount of acreage, owned by Exxon Co., in the State of Louisiana. The land is traversed by a system of manmade canals, which are approximately 60 feet wide and 8 feet deep. The canals are both subject to tidal fluctuations and navigable in fact. They were constructed with private funds, and have been continuously in the control and possession of respondent Vermilion Corp., Exxon, and their predecessors, for a long period of time.

The canal system enters other naturally navigable waterways, and lies between the Gulf Intracoastal Waterway on the north and the Gulf of Mexico on the south. The canals are used for fishing and hunting and are also used by Exxon for oil and gas exploration and development activities. Respondent Vermilion subleases portions of the Exxon land to hunters, trappers, and fishers, and the right to use the canals is a part of the sublease agreement.

In order to control access to the land and the canals, over 400 "No Trespassing" signs are posted in various locations. Respondent Vermilion Corp employs people to supervise activities in the canals and on the land, and on numerous occasions such people have prohibited strangers from entering and using the property in question.

The present controversy arises out of petitioners' insistence that notwithstanding Vermilion's property rights, they were entitled as a matter of federal law— without obtaining respond-

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Inc.; by *Elvis J. Stahr, Jr.*, for the National Audubon Society; and by *Edward B. Poitevent* and *Harry S. Hardin III* for Ramos Investment Co.

ent's permission—to enter the property, travel the canals, and engage in commercial fishing and shrimping activities. Petitioners disregarded several written warnings issued by respondent; respondent then filed suit in the Louisiana state court seeking permanent injunctions against petitioners from trespassing on the land and making use of the canals.*

After commencement of the litigation, respondent moved for summary judgment, based on affidavits and a deposition, pursuant to the appropriate article of the Louisiana Code of Civil Procedure. The trial court granted the motion and petitioners appealed to the Louisiana Court of Appeal. That court affirmed. 356 So. 2d 551. The petition for certiorari here sets forth two questions for review. Pet. for Cert. 5. The first is if a private citizen on his privately held real property and with private funds creates a system of artificial navigable waterways, in part by means of diversion or destruction of a pre-existing natural navigable waterway, does the artificially developed waterway system become part of the "navigable waterways of the United States" and subject to the use of all citizens of the United States? The second is whether channels built on private property and with private funds, in such a manner that they ultimately join with other navigable waterways, are similarly open to use by all citizens of the United States. The difference between the two questions is obvious: The first posits the diversion or destruction of a pre-existing natural navigable waterway in the process of construction of the private waterway, whereas the second does not. We think that our opinion in *Kaiser Aetna* v. *United States, ante,* p. 164, adequately answers the second question presented for review and that the Louisiana Court of Appeal

*The Louisiana Court of Appeal, Third Circuit, which was the only Louisiana appellate court to render a written opinion on the question, stated in that opinion that no proof of damages was introduced in the trial court, although they had been prayed for in the complaint, and that no question of damages was raised on the appeal from the trial court to the appellate court.

was correct in determining that on such facts no general right of use in the public arose by reason of the authority over navigation conferred upon Congress by the Commerce Clause of Art. I of the United States Constitution. But the Louisiana Court of Appeal also held that even though the destruction or diversion of naturally navigable waterways occurred in the process of constructing the private waterways, the result would be no different. In so doing, the Court of Appeal relied on *Ilhenny* v. *Broussard*, 172 La. 895, 135 So. 669 (1931), a decision of the Supreme Court of Louisiana. The Court of Appeal, in the light of this decision, held that a factual dispute between the litigants in this case was immaterial, and that summary judgment was proper as a matter of law. That factual dispute is summarized by the Louisiana Court of Appeal in these words:

> "Defendants contend, however, that there is a fact in dispute which is genuinely material to this litigation and that summary judgment was improper. They claim that plaintiff's system of artificial waterways destroyed the navigability of surrounding natural waterways. They argue that this is material because, if true, the court could conclude that the system of artificial waterways was substituted for the pre-existing natural system of navigable waterways. If such a conclusion were reached, the canals would not be private and could not be privately controlled under state and federal law." 356 So. 2d, at 553.

While neither our opinion in *Kaiser Aetna* v. *United States* nor any of the principal cases relied on there deal with this specific fact situation, we do not think it can be said as a matter of law that if petitioners proved their factual allegations that proof would not constitute a defense under federal law to respondent's prayer for injunctive relief in the trial court.

Accordingly, the judgment of the Louisiana Court of Appeal is affirmed with respect to the second question presented in

the petition for certiorari, and vacated and remanded for further proceedings not inconsistent with our opinion in *Kaiser Aetna* v. *United States*, decided today, with respect to the first question.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

Since the canals involved in this case are entirely artificial in their construction, applicability of the federal navigational servitude is a somewhat closer question than in *Kaiser Aetna* v. *United States*, *ante*, p. 164. Nevertheless, for the reasons given in my dissenting opinion in that case, *ante*, p. 180, I would reverse the judgment of the Louisiana Court of Appeal.

There is no question that the canals are navigable in fact, or that they give access to the Gulf Intracoastal Waterway, a waterway used for interstate navigation and subject to plenary federal control. The canals are currently used for commercial navigation. They are, thus, "navigable waters of the United States."

If the United States had condemned respondent's fast land in order to construct the canals, I would agree that compensation would be required, although the valuation of the land could not include its potential use as a canal. Cf. *United States* v. *Rands*, 389 U. S. 121 (1967). But the Government did not initiate the construction. Rather, respondent's predecessors in interest voluntarily undertook to transform land into navigable water for purposes of obtaining access to a highway of waterborne commerce. In doing so, they subjected their former fast land to the dominant federal interest in navigation and surrendered the right to control access to the canals.

As in *Kaiser Aetna*, I would hold that the public interest in free navigation predominates, and that, if restrictions on access are warranted, they should be accomplished through the

auspices of the Army Corps of Engineers. While I agree with the Court that it would be inappropriate on this record to decide the first question presented for review, my answer to the second question obviates the necessity of reaching the first. I thus perceive no need to remand the case for further proceedings.

CARBON FUEL CO. *v.* UNITED MINE WORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78-1183. Argued November 5, 1979—Decided December 10, 1979

Respondent local labor unions engaged in a number of unauthorized or "wildcat" strikes at petitioner employer's coal mines in violation of collective-bargaining agreements between petitioner and respondent international union (UMWA). The efforts of respondent regional subdivision (District 17) of UMWA to persuade the miners not to strike and to return to work were uniformly unsuccessful. Petitioner subsequently brought suit against respondents in Federal District Court pursuant to § 301 of the Labor Management Relations Act, 1947, seeking injunctive relief and damages, and judgments were rendered against all respondents. The Court of Appeals affirmed in part the judgments against the local unions but vacated the judgments against UMWA and District 17, holding that the question was not whether UMWA or District 17 did everything they might have done to prevent the strikes or bring about their termination, but whether they instigated, supported, ratified, or encouraged the strikes, and that there was no evidence of the latter conduct.

Held: Neither UMWA nor District 17 can be held liable in damages under the circumstances of this case. No obligation on their part to use all reasonable means to prevent and end unauthorized strikes can be implied in law either because the collective-bargaining agreements contained a provision for arbitration of disputes or because the agreements provided that the parties "agree and affirm that they will maintain the integrity of this contract." Pp. 216-222.

(a) The legislative history of § 301 is clear that Congress limited a union's responsibility for strikes in breach of contract to cases where the union may be found responsible according to the common-law rule of agency, and here petitioner failed to prove agency as required by §§ 301 (b) and (e). Pp. 216-218.

(b) The bargaining history of the collective-bargaining agreements clearly shows that, whatever the integrity clause of the agreements may mean, the parties purposely decided not to impose on the union

an obligation to take disciplinary or other actions to get unauthorized strikers back to work. Pp. 218–222.

582 F. 2d 1346, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court.

David D. Johnson argued the cause for petitioner. With him on the briefs were *Forrest H. Roles* and *Larry L. Roller.*

Harrison Combs argued the cause for respondents. With him on the brief were *Richard L. Trumka, James M. Haviland, Isaac N. Groner,* and *Walter H. Fleischer.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision in this case is whether an international union, which neither instigates, supports, ratifies, nor encourages "wildcat" strikes engaged in by local unions in violation of a collective-bargaining agreement, may be held liable in damages to an affected employer if the union did not use all reasonable means available to it to prevent the strikes or bring about their termination.

Petitioner, Carbon Fuel Co., and respondent United Mine Workers of America (UMWA) were parties to the National Bituminous Coal Wage Agreements of 1968 and 1971, collective-bargaining agreements covering, *inter alia,* workers at petitioner's several coal mines in southern West Virginia. Forty-eight unauthorized or "wildcat" strikes were engaged in by three local unions at petitioner's mines from 1969 to 1973. Efforts of District 17, a regional subdivision of UMWA, to

*Briefs of *amici curiae* urging reversal were filed by *Leonard L. Scheinholtz* for the Bituminous Coal Operators' Association, Inc.; by *Vincent J. Apruzzese* and *Stephen A. Bokat* for the Chamber of Commerce of the United States; and by *Daniel J. Popeo* and *Paul D. Kamenar* for the Washington Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of Industrial Organizations; and by *William Tomar* for the Glass Bottle Blowers Association of the United States and Canada, AFL–CIO.

persuade the miners not to strike and to return to work were uniformly unsuccessful.[1]

Petitioner brought this suit pursuant to § 301 of the Labor Management Relations Act, 1947 (Taft-Hartley Act), 61 Stat. 156, 29 U. S. C. § 185, in the District Court for the Southern District of West Virginia. UMWA, District 17, and the three local unions were named defendants. The complaint sought injunctive relief [2] and damages, alleging that the strikes were in violation of the two collective-bargaining agreements. The case was tried before a jury. The trial judge found as a matter of law that the strikes violated the agreements. The trial judge also instructed the jury, over objection of UMWA and District 17, that those defendants might be found liable in damages to petitioner "[i]f you find from a preponderance of the evidence that the International and District Unions did not use all of the reasonable means available to them to prevent work stoppages or strikes from occurring in violation of the contract, or to terminate any such work stoppages or strikes after they began. . . ." App. 197a. Verdicts in different amounts were returned against UMWA, District 17, and the three local unions.

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[1] The facts relevant to the participation of the District and International in the wildcat strikes can be briefly stated. As recently as 1966 the International expressed its intention to discipline "wildcatters." The District and International were promptly notified of each strike. In each instance a District representative arranged for a meeting of the striking local and directed the members to return to work. Often the representative advised the members that the International and the District could take disciplinary action against participants in illegal, unauthorized strikes. If the strike did not end after the first meeting a second meeting was called. Most strikes ended in the first one or two days. No strike lasted longer than six days. From concern that such action might only aggravate a bad situation, no disciplinary action was taken against the strikers. There is however no suggestion that the District's efforts to end the strikes were not in good faith.

[2] The contracts have expired, and the question of injunctive relief is out of the case.

On appeal, the Court of Appeals for the Fourth Circuit vacated in part the judgments against the three local unions but otherwise affirmed those judgments.[3] However, the Court of Appeals vacated the judgments against UMWA and District 17, and remanded to the District Court with directions to dismiss the case against those defendants. 582 F. 2d 1346 (1978). The court held that this result was required by its earlier decision in *United Construction Workers* v. *Haislip Baking Co.*, 223 F. 2d 872 (1955). 582 F. 2d, at 1351. *Haislip* held as follows, 223 F. 2d, at 877–878:

> "We have never held . . . that there is any responsibility on the part of a union for a strike with which it has had nothing to do; and there manifestly is no such liability. If [UMWA or District 17] had done nothing when [petitioner] called on them to help get the men back to work, there would have been no liability on the part of [UMWA or District 17]. This being true, defendants were not rendered liable by the efforts which [District 17] made to bring about an adjustment of the difficulty, even if they did not do everything that they might have done to that end. The question is not whether they did everything they might have done, but whether they adopted, encouraged or prolonged the continuance of the strike. There is no evidence of any sort that they did."

The Court of Appeals recognized that its conclusion was in conflict with the holding of the Court of Appeals for the Third Circuit in *Eazor Express, Inc.* v. *International Brotherhood of Teamsters*, 520 F. 2d 951 (1975) (union liable under no-strike clause for failure to use best efforts to end unauthorized strikes).[4] We granted certiorari to resolve the conflict. 440 U. S. 957 (1979). We affirm.

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[3] Review of the judgments against the locals was not sought here.

[4] Accord, *Republic Steel Corp.* v. *UMWA*, 570 F. 2d 467 (CA3 1978); *Bituminous Coal Operators* v. *UMWA*, 585 F. 2d 586 (CA3 1978); *United States Steel Corp.* v. *UMWA*, 534 F. 2d 1063 (CA3 1976); *Wagner Elec.*

Petitioner argues that the obligation of UMWA and District 17 to use all reasonable means to prevent and end unauthorized strikes in violation of the collective-bargaining agreement is either (a) implied in law because the agreement contains an arbitration provision or (b) in any event is to be implied from the provision of the agreement that the parties "agree and affirm that they will maintain the integrity of this contract. . . ." We find no merit in either argument.

A

Insofar as petitioner's argument relies on the history of § 301 and the congressional plan to prevent and remedy strikes in breach of contract by encouraging arbitration, the legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency.[5]

Section 301 (a) makes collective-bargaining agreements judicially enforceable. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957). At the same time, Congress gave careful attention to the problem of strikes during the term of a collective-bargaining agreement, but stopped short of imposing liability upon a union for strikes not authorized, participated in, or ratified by it. Rather, to effectuate § 301 (a), the Taft-Hartley Act provided in § 301 (b) that a union "shall be

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Corp. v. *Local 1104, Electrical Workers*, 496 F. 2d 954 (CA8 1974). Contra, *Southern Ohio Coal Co.* v. *UMWA*, 551 F. 2d 695 (CA6 1977).

[5] An international union, of course, is responsible under § 301 for any authorized strike if such strike violates any term of the contract, whether express or implied. See, *e. g.*, *Gateway Coal Co.* v. *Mine Workers*, 414 U. S. 368 (1974); *Boys Markets, Inc.* v. *Retail Clerks*, 398 U. S. 235 (1970). Our holding in Part A of this opinion does not affect the *content*, as implied by law, of arbitration clauses. Rather, we are addressing the wholly different issue of whether an international or district union may be held legally responsible for locals' unilateral actions which are concededly in violation of the locals' responsibilities under the contract.

bound by the acts of its agents," and in § 301 (e) provided that the common law of agency shall govern "in determining whether any person is acting as an 'agent' of another person." In explaining § 301 (e) Senator Taft stated, 93 Cong. Rec. 4022 (1947):

> "If the wife of a man who is working at a plant receives a lot of telephone messages, very likely it cannot be proved that they came from the union. *There is no case then. There must be legal proof of agency in the case of unions as in the case of corporations. . . .*" (Emphasis supplied.)

Congress' reason for adopting the common-law agency test, and applying to unions the common-law doctrine of *respondeat superior*, follows the lead of Mr. Chief Justice Taft in *Coronado Coal Co.* v. *Mine Workers*, 268 U. S. 295, 304 (1925), that to find the union liable "it must be clearly shown . . . that what was done was done by their agents in accordance with their fundamental agreement of association." The common-law agency test replaced the very loose test of responsibility incorporated in § 2 (2) of the original 1935 National Labor Relations Act under which the term "employer" included "any person acting in the interest of an employer. . . ." 49 Stat. 450.[6]

Petitioner makes the distinct argument that we should hold the International liable for its *own* failure to respond to the locals' strike. In the face of Congress' clear statement of the limits of an international union's legal responsibility for the acts of one of its local unions, it would be anomalous to hold that an international is nonetheless liable for its failure to take

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[6] At the same time, Congress applied to unions the common-law doctrine of *respondeat superior* rather than the more restrictive test of union responsibility under § 6 of the Norris-LaGuardia Act, which requires "clear proof of *actual* participation in, or *actual* authorization of, such acts, or of ratification of such acts after *actual* knowledge thereof." 29 U. S. C. § 106 (emphasis supplied).

certain steps in response to actions of the local. Such a rule would pierce the shield that Congress took such care to construct. Accordingly, we reject petitioner's suggestion that Congress' policy in favor of arbitration extends to imposing an obligation on the respondents, which agreed to arbitrate grievances, to use reasonable means to try to control the locals' actions in contravention of that agreement.

The Court of Appeals stated: "There was no evidence presented in the district court that either the District or International Union instigated, supported, ratified, or encouraged any of the work stoppages. . . ." 582 F. 2d, at 1351. Under Art. XVI, § 1, of the UMWA constitution, the local unions lacked authority to strike without authorization from UMWA. App. 195a. Moreover, UMWA had repeatedly expressed its opposition to wildcat strikes. Petitioner thus failed to prove agency as required by §§ 301 (b) and (e), and we therefore agree with the Court of Appeals that "under these circumstances it was error for the [District Court] to deny the motions of these defendants for directed verdicts." 582 F. 2d, at 1351.

B

We turn next to petitioner's argument that even if the no-strike obligation to be implied from the promise to resolve disputes by arbitration did not carry with it the further step of implying an obligation on UMWA and District 17 to use all reasonable efforts to end an unauthorized strike, that obligation should nevertheless be implied from the contract provision obligating UMWA and District 17 to "maintain the integrity of this contract. . . ."

In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free collective bargaining. See *Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 104 (1962); *NLRB* v. *Insurance Agents*, 361 U. S. 477, 488 (1960); *Textile Workers* v. *Lincoln Mills*, *supra*, at 453–454.

And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8 (d) defining "to bargain collectively" as "not [to] compel either party to agree to a proposal or require the making of a concession." 29 U. S. C. § 158 (d). See *Howard Johnson Co.* v. *Hotel Employees*, 417 U. S. 249, 254–255 (1974); *NLRB* v. *Burns Security Services*, 406 U. S. 272, 287 (1972); *H. K. Porter Co.* v. *NLRB*, 397 U. S. 99, 104–106 (1970); *NLRB* v. *Insurance Agents*, *supra*, at 488. It follows that the parties' agreement primarily determines their relationship. *Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574 (1960) (though policy in favor of arbitration may color interpretation of contract, it cannot impose an agreement to arbitrate where the parties have agreed not to arbitrate). See *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 570 (1960) (BRENNAN, J., concurring). If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.

The contractual provision to which petitioner looks to create the alleged union duty to use "all reasonable means" to end wildcat strikes is the promise to "maintain the integrity of this contract." Petitioner argues that the promise, intended to get disputes into arbitration, is meaningless if the UMWA and District 17 have no obligation to exert their best efforts to force the miners to live up to the contracts.

The bargaining history of the contracts completely answers petitioner's argument. The parties directly addressed the issue early in their bargaining history and, after first including such an obligation, specifically deleted it from their agreement. The first agreement between the parties, in 1941, contained an explicit no-strike clause. In order to avoid liability under § 301 for contract breaches, UMWA negotiated the deletion of the no-strike provision from the 1947 contract. Instead, the coverage of the contract was limited to employees

"able and willing to work," and the parties agreed that all disagreements would be settled through arbitration or collective bargaining. In 1950 the contract was again rewritten. The "able and willing" provision was dropped and replaced by a promise "to maintain the integrity of this contract and *to exercise their best efforts through available disciplinary measures* to prevent stoppages of work by strike or lockout." (Emphasis supplied.) [7]

Because the union did not want to surrender its freedom to decide what measures to take or not to take in dealing with unauthorized strikes, it negotiated the deletion of the "best efforts through available disciplinary measures" clause. See *International Union, UMWA* v. *NLRB*, 103 U. S. App. D. C. 207, 212–213, 257 F. 2d 211, 216–217 (1958); *International Union, UMWA*, 117 N. L. R. B. 1095, 1118 (1957) (Intermediate Report of Trial Examiner, reprinted as an appendix to NLRB opinion).[8] The new provision in the 1952 contract,

[7] The full text of this new provision read:

"The United Mine Workers of America and the Operators signatory hereto affirm their intention to maintain the integrity of this contract and to exercise their best efforts through available disciplinary measures to prevent stoppages of work by strike or lockout pending adjustment or adjudication of disputes and grievances in the manner provided in this agreement."

[8] Contrary to petitioner's suggestion, the Trial Examiner's opinion, which was affirmed by the Labor Board but set aside by the Court of Appeals, does not present an inconsistent interpretation of the bargaining history on this point. Although the Trial Examiner gave more importance to the retention of the integrity clause than to the deletion of the best-efforts clause, he did so in the discrete context of deciding whether or not there was an implied agreement not to strike. The issue of what obligation, if any, the union owed to try to get the miners back to work was not before the Board. Consequently, the importance of the best-efforts language was properly minimized.

In fact, the Trial Examiner's interpretation of the contract appears to reject, rather than support, petitioner's suggested reading concerning the damages liability of UMWA for wildcat strikes. He stated that the contract and the bargaining history suggested that "the contracting parties may have intended that no breach of contract damage or other suits result-

which was carried forward into the 1968 and 1971 contracts essentially unchanged as to this issue, read as follows:

> "The United Mine Workers of America and the Operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of the Agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

It makes no sense to assume that the parties thought the new language subsumed the deleted provision. Had that been their intention, there would have been no reason to alter the contract.

The inescapable conclusion to be drawn from their bargaining history is that, whatever the integrity clause may mean,[9] the parties purposely decided not to impose on the union an obligation to take disciplinary or other actions to get unauthorized strikers back to work. It would do violence to the bargaining process and the national policy furthering free collective bargaining to impose by judicial implication a duty upon UMWA and District 17 that the parties in

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ing from strikes should be lodged in courts of law." 117 N. L. R. B., at 1115. This suit seeks damages in a court of law on the basis of a breach of contract resulting from a strike.

[9] We need not decide what content the "integrity" clause has since we have determined that it does not support petitioner's cause of action. The District of Columbia Circuit has suggested one possible meaning. *International Union, UMWA* v. *NLRB*, 103 U. S. App. D. C. 207, 214, 257 F. 2d 211, 218 (1958).

arm's-length bargaining first included and then purposely deleted.

Moreover, since the deletion but before 1968 or 1971 when these agreements were reached, two Courts of Appeals construed this contract as not imposing liability on the union for wildcat strikes and as not requiring UMWA to take any action with regard to such strikes. *Lewis* v. *Benedict Coal Corp.*, 259 F. 2d 346, 351 (CA6 1958) (Stewart, J.), aff'd by an equally divided Court, 361 U. S. 459, 464 (1960); *United Construction Workers* v. *Haislip Baking Co.*, 223 F. 2d, at 877.[10] If these interpretations did not accord with the parties' understanding of their contract, they had ample opportunity to make their own understanding explicit. Failure to do so strongly suggests the parties incorporated the courts' interpretation of the agreements.

Affirmed.

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[10] Since 1971 the Seventh Circuit has adopted the same reading of this contract. *Old Ben Coal Corp.* v. *Local Union No. 1487, United Mine Workers*, 457 F. 2d 162, 164 (1972). Only the Third Circuit has read this provision differently. *United States Steel Corp.* v. *UMWA*, 534 F. 2d, at 1072–1073.

STRYCKER'S BAY NEIGHBORHOOD COUNCIL, INC. *v.* KARLEN ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79–168. Decided January 7, 1980*

Held: The Court of Appeals erred in concluding that when the Department of Housing and Urban Development (HUD) considered alternative sites before redesignating a proposed site for middle-income housing as one for low-income housing it should have given determinative weight to environmental factors such as crowding low-income housing into a concentrated area and should not have considered the delay that would occur in developing an alternative site as an overriding factor. Once an agency has made a decision subject to the procedural requirements of the National Environmental Policy Act of 1969, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken. Here, there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing, and the Act requires no more.

Certiorari granted; 590 F. 2d 39, reversed.

PER CURIAM.

The protracted nature of this litigation is perhaps best illustrated by the identity of the original federal defendant, "George Romney, Secretary of the Department of Housing and Urban Development." At the center of this dispute is the site of a proposed low-income housing project to be constructed on Manhattan's Upper West Side. In 1962, the New York City Planning Commission (Commission), acting in conjunction with the United States Department of Housing and Urban Development (HUD), began formulating a

*Together with No. 79–181, *City of New York* v. *Karlen et al.*; and No. 79–184, *Secretary of Housing and Urban Development* v. *Karlen et al.*, also on petitions for certiorari to the same court.

plan for the renewal of 20 square blocks known as the "West Side Urban Renewal Area" (WSURA) through a joint effort on the part of private parties and various government agencies. As originally written, the plan called for a mix of 70% middle-income housing and 30% low-income housing and designated the site at issue here as the location of one of the middle-income projects. In 1969, after substantial progress toward completion of the plan, local agencies in New York determined that the number of low-income units proposed for WSURA would be insufficient to satisfy an increased need for such units. In response to this shortage the Commission amended the plan to designate the site as the future location of a high-rise building containing 160 units of low-income housing. HUD approved this amendment in December 1972.

Meanwhile, in October 1971, the Trinity Episcopal School Corp. (Trinity), which had participated in the plan by building a combination school and middle-income housing development at a nearby location, sued in the United States District Court for the Southern District of New York to enjoin the Commission and HUD from constructing low-income housing on the site. The present respondents, Roland N. Karlen, Alvin C. Hudgins, and the Committee of Neighbors To Insure a Normal Urban Environment (CONTINUE), intervened as plaintiffs, while petitioner Strycker's Bay Neighborhood Council, Inc., intervened as a defendant.

The District Court entered judgment in favor of petitioners. See *Trinity Episcopal School Corp.* v. *Romney*, 387 F. Supp. 1044 (1974). It concluded, *inter alia*, that petitioners had not violated the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*

On respondents' appeal, the Second Circuit affirmed all but the District Court's treatment of the NEPA claim. See *Trinity Episcopal School Corp.* v. *Romney*, 523 F. 2d 88

(1975). While the Court of Appeals agreed with the District Court that HUD was not required to prepare a full-scale environmental impact statement under § 102 (2)(C) of NEPA, 42 U. S. C. § 4332 (2)(C), it held that HUD had not complied with § 102 (2)(E),[1] which requires an agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U. S. C. § 4332 (2)(E). See 523 F. 2d., at 92–95. According to the Court of Appeals, any consideration by HUD of alternatives to placing low-income housing on the site "was either highly limited or nonexistent." *Id.*, at 94. Citing the "background of urban environmental factors" behind HUD's decision, the Court of Appeals remanded the case, requiring HUD to prepare a "statement of possible alternatives, the consequences thereof and the facts and reasons for and against. . . ." *Ibid.* The statement was not to reflect "HUD's concept or the Housing Authority's views as to how these agencies would choose to resolve the city's low income group housing situation," but rather was to explain "how within the framework of the Plan its objective of economic integration can best be achieved with a minimum of adverse environmental impact." *Ibid.* The Court of Appeals believed that, given such an assessment of alternatives, "the agencies with the cooperation of the interested parties should be able to arrive at an equitable solution." *Id.*, at 95.

On remand, HUD prepared a lengthy report entitled Special Environmental Clearance (1977). After marshaling the data, the report asserted that, "while the choice of Site 30 for development as a 100 percent low-income project has raised

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[1] At the time of the Court of Appeals' decision, this section was numbered 102 (2)(D) and was codified at 42 U. S. C. § 4332 (2)(D) (1970 ed.). Congress redesignated it two weeks later. See Act of Aug. 9, 1975, Pub. L. 94–83, 89 Stat. 424.

valid questions about the potential social environmental impacts involved, the problems associated with the impact on social fabric and community structures are not considered so serious as to require that this component be rated as unacceptable." Special Environmental Clearance Report 42. The last portion of the report incorporated a study wherein the Commission evaluated nine alternative locations for the project and found none of them acceptable. While HUD's report conceded that this study may not have considered all possible alternatives, it credited the Commission's conclusion that any relocation of the units would entail an unacceptable delay of two years or more. According to HUD, "[m]easured against the environmental costs associated with the minimum two-year delay, the benefits seem insufficient to justify a mandated substitution of sites." *Id.*, at 54.

After soliciting the parties' comments on HUD's report, the District Court again entered judgment in favor of petitioners. See *Trinity Episcopal School Corp.* v. *Harris*, 445 F. Supp. 204 (1978). The court was "impressed with [HUD's analysis] as being thorough and exhaustive," *id.*, at 209–210, and found that "HUD's consideration of the alternatives was neither arbitrary nor capricious"; on the contrary, "[i]t was done in good faith and in full accordance with the law." *Id.*, at 220.

On appeal, the Second Circuit vacated and remanded again. *Karlen* v. *Harris*, 590 F. 2d 39 (1978). The appellate court focused upon that part of HUD's report where the agency considered and rejected alternative sites, and in particular upon HUD's reliance on the delay such a relocation would entail. The Court of Appeals purported to recognize that its role in reviewing HUD's decision was defined by the Administrative Procedure Act (APA), 5 U. S. C. § 706 (2) (A), which provides that agency actions should be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." Additionally,

however, the Court of Appeals looked to "[t]he provisions of NEPA" for "the substantive standards necessary to review the merits of agency decisions. . . ." 590 F. 2d, at 43. The Court of Appeals conceded that HUD had "given 'consideration' to alternatives" to redesignating the site. *Id.*, at 44. Nevertheless, the court believed that " 'consideration' is not an end in itself." *Ibid.* Concentrating on HUD's finding that development of an alternative location would entail an unacceptable delay, the appellate court held that such delay could not be "an overriding factor" in HUD's decision to proceed with the development. *Ibid.* According to the court, when HUD considers such projects, "environmental factors, such as crowding low-income housing into a concentrated area, should be given determinative weight." *Ibid.* The Court of Appeals therefore remanded the case to the District Court, instructing HUD to attack the shortage of low-income housing in a manner that would avoid the "concentration" of such housing on Site 30. *Id.*, at 45.

In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 558 (1978), we stated that NEPA, while establishing "significant substantive goals for the Nation," imposes upon agencies duties that are "essentially procedural." As we stressed in that case, NEPA was designed "to insure a fully informed and well-considered decision," but not necessarily "a decision the judges of the Court of Appeals or of this Court would have reached had they been members of the decisionmaking unit of the agency." *Ibid.* *Vermont Yankee* cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to

be taken.'" *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976). See also *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U. S. 326 (1976).[2]

In the present litigation there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more. The petitions for certiorari are granted, and the judgment of the Court of Appeals is therefore

Reversed.

MR. JUSTICE MARSHALL, dissenting.

The issue raised by these cases is far more difficult than the *per curiam* opinion suggests. The Court of Appeals held that the Secretary of Housing and Urban Development (HUD) had acted arbitrarily in concluding that prevention of a delay in the construction process justified the selection of a housing site which could produce adverse social environmental effects, including racial and economic concentration. Today the majority responds that "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences," and that in this litigation "there is no doubt that HUD considered the environmental consequences of its decision to redesignate the proposed site for low-income housing. NEPA requires no more." The majority finds support for this conclusion in the closing para-

[2] If we could agree with the dissent that the Court of Appeals held that HUD had acted "arbitrarily" in redesignating the site for low-income housing, we might also agree that plenary review is warranted. But the District Court expressly concluded that HUD had not acted arbitrarily or capriciously and our reading of the opinion of the Court of Appeals satisfies us that it did not overturn that finding. Instead, the appellate court required HUD to elevate environmental concerns over other, admittedly legitimate, considerations. Neither NEPA nor the APA provides any support for such a reordering of priorities by a reviewing court.

graph of our decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U. S. 519, 558 (1978).

Vermont Yankee does not stand for the broad proposition that the majority advances today. The relevant passage in that opinion was meant to be only a "further observation of some relevance to this case," *id.*, at 557. That "observation" was a response to this Court's perception that the Court of Appeals in that case was attempting "under the guise of judicial review of agency action" to assert its own policy judgment as to the desirability of developing nuclear energy as an energy source for this Nation, a judgment which is properly left to Congress. *Id.*, at 558. The Court of Appeals had remanded the case to the agency because of "a single alleged oversight on a peripheral issue, urged by parties who never fully cooperated or indeed raised the issue below," *ibid.* It was in this context that the Court remarked that "NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is *essentially* procedural." *Ibid.* (emphasis supplied). Accordingly, "[a]dministrative decisions should be set aside in this context, *as in every other*, only for substantial procedural *or substantive* reasons as mandated by statute," *ibid.* (emphasis supplied). Thus *Vermont Yankee* does not stand for the proposition that a court reviewing agency action under NEPA is limited solely to the factual issue of whether the agency "considered" environmental consequences. .The agency's decision must still be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U. S. C. § 706 (2)(A), and the reviewing court must still insure that the agency "has taken a 'hard look' at environmental consequences," *Kleppe* v. *Sierra Club*, 427 U. S. 390, 410, n. 21 (1976).

In the present case, the Court of Appeals did not "substitute its judgment for that of the agency as to the environmental consequences of its actions," *ibid.*, for HUD in its

Special Environmental Clearance Report acknowledged the adverse environmental consequences of its proposed action: "the choice of Site 30 for development as a 100 percent low-income project has raised valid questions about the potential social environmental impacts involved." These valid questions arise from the fact that 68% of all public housing units would be sited on only one crosstown axis in this area of New York City. As the Court of Appeals observed, the resulting high concentration of low-income housing would hardly further racial and economic integration. The environmental "impact . . . on social fabric and community structures" was given a B rating in the report, indicating that from this perspective the project is "questionable" and ameliorative measures are "mandated." The report lists 10 ameliorative measures necessary to make the project acceptable. The report also discusses two alternatives, Sites 9 and 41, both of which are the appropriate size for the project and require "only minimal" amounts of relocation and clearance. Concerning Site 9 the report explicitly concludes that "[f]rom the standpoint of social environmental impact, this location would be superior to Site 30 for the development of low-rent public housing." The sole reason for rejecting the environmentally superior site was the fact that if the location were shifted to Site 9, there would be a projected delay of two years in the construction of the housing.

The issue before the Court of Appeals, therefore, was whether HUD was free under NEPA to reject an alternative acknowledged to be environmentally preferable solely on the ground that any change in sites would cause delay. This was hardly a "peripheral issue" in the case. Whether NEPA, which sets forth "significant substantive goals," *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, at 558, permits a projected 2-year time difference to be controlling over environmental superiority is by no means clear. Resolution of the issue, however, is certainly within the normal scope of review of agency action to determine if it is arbitrary,

capricious, or an abuse of discretion.* The question whether HUD can make delay the paramount concern over environmental superiority is essentially a restatement of the question whether HUD in considering the environmental consequences of its proposed action gave those consequences a "hard look," which is exactly the proper question for the reviewing court to ask. *Kleppe* v. *Sierra Club, supra,* at 410, n. 21.

The issue of whether the Secretary's decision was arbitrary or capricious is sufficiently difficult and important to merit plenary consideration in this Court. Further, I do not subscribe to the Court's apparent suggestion that *Vermont Yankee* limits the reviewing court to the essentially mindless task of determining whether an agency "considered" environmental factors even if that agency may have effectively decided to ignore those factors in reaching its conclusion. Indeed, I cannot believe that the Court would adhere to that position in a different factual setting. Our cases establish that the arbitrary-or-capricious standard prescribes a "searching and careful" judicial inquiry designed to ensure that the agency has not exercised its discretion in an unreasonable manner. *Citizens To Preserve Overton Park, Inc.* v. *Volpe,* 401 U. S. 402, 416 (1971). Believing that today's summary reversal represents a departure from that principle, I respectfully dissent.

It is apparent to me that this is not the type of case for a summary disposition. We should at least have a plenary hearing.

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*The Secretary concedes that if an agency gave little or no weight to environmental values its decision might be arbitrary or capricious. Pet. for Cert. in No. 79–184, p. 15, n. 16.

McLAIN ET AL. *v.* REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–1501. Argued November 6, 1979—Decided January 8, 1980

Petitioners, claiming individually and on behalf of a certain class of real estate purchasers and sellers, instituted this private antitrust action in Federal District Court against respondents, certain real estate firms and trade associations and a class consisting of real estate brokers who had transacted realty brokerage business in the Greater New Orleans area during the four years preceding the filing of the complaint. Petitioners alleged, *inter alia*, that respondents had engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act through an agreement to conform to a fixed rate of brokerage commissions on sales of residential property. The complaint also included allegations that respondents' activities were "within the flow of interstate commerce and have an effect upon that commerce," and that respondents assisted their clients in securing financing and title insurance which came from sources outside the State. Respondents moved to dismiss the complaint for failure to state a claim under the Sherman Act, contending that their activities were purely local in nature and did not substantially affect interstate commerce. The District Court granted the motion to dismiss the complaint, holding that under *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773, there must be a substantial volume of interstate commerce involved in the overall real estate transaction and the challenged activity must be an essential, integral part of the transaction, inseparable from its interstate aspects; and that here a broker's participation in the presumably interstate aspects of securing title insurance and financing was only incidental rather than indispensable. The Court of Appeals affirmed, holding that under *Goldfarb* v. *Virginia State Bar*, *supra*, Sherman Act jurisdiction did not exist because petitioners had failed to demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance.

Held: The complaint should not have been dismissed at this stage of the proceedings. Pp. 241–247.

(a) To establish jurisdiction under the Sherman Act, a plaintiff must allege the relationship between the activity involved and some aspect of

interstate commerce and, if these allegations are controverted, must submit evidence to demonstrate either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. Here, petitioners may establish the jurisdictional element of a Sherman Act violation by demonstrating a substantial effect on interstate commerce generated by respondents' brokerage activity, and petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful. Pp. 241–243.

(b) The courts below misinterpreted *Goldfarb* v. *Virginia State Bar*, *supra*, as requiring that petitioners demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance. The *Goldfarb* holding was not addressed to the "effect on commerce" test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce. Pp. 243–245.

(c) Here, what was submitted to the District Court shows a sufficient basis for satisfying the Act's jurisdictional requirements under the "effect on commerce" theory so as to entitle petitioners to go forward. The record makes it clear that there is a basis for petitioners to proceed to trial where there will be opportunity to establish that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property, that this appreciable commercial activity has occurred in interstate commerce, and that respondents' activities which allegedly have been infected by a price-fixing conspiracy have, as a matter of practical economics, a not insubstantial effect on the interstate commerce involved. Pp. 245–247.

583 F. 2d 1315, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined, except MARSHALL, J., who took no part in the consideration or decision of the case.

Richard G. Vinet argued the cause for petitioners. With him on the brief was *John P. Nelson, Jr.*

Harry McCall, Jr., argued the cause for respondents. With him on the brief for respondents Real Estate Board of New

Orleans et al. were *Arthur L. Ballin, Frank C. Dudenhefer, Edward F. Wegmann, Harry S. Redmon, Jr., Rutledge Clement, Jr., Charles F. Barbera, Moise S. Steeg, Jr.*, and *William D. North. Edward F. Schiff, Paul B. Hewitt*, and *Moise W. Dennery* filed a brief for respondent Latter & Blum, Inc.

Deputy Solicitor General Easterbrook argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree, Assistant Attorney General Shenefield, John J. Powers III*, and *Margaret G. Halpern.**

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question in this case is whether the Sherman Act extends to an agreement among real estate brokers in a market area to conform to a fixed rate of brokerage commissions on sales of residential property.

I

The complaint in this private antitrust action, filed in the Eastern District of Louisiana in 1975, alleges that real estate brokers in the Greater New Orleans area have engaged in a price-fixing conspiracy in violation of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U. S. C. § 1. No trial has as yet been had on the merits of the claims since the complaint was dismissed for failure to establish the interstate commerce component of Sherman Act jurisdiction.

The complaint asserts a claim individually and on behalf of that class of persons who employed the services of a respondent real estate broker in the purchase or sale of

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**William D. North* and *Valentine A. Weber, Jr.*, filed a brief for the National Association of Realtors as *amicus curiae* urging affirmance.

Ellen Broadman and *Alan Mark Silbergeld* filed a brief for Consumers Union of United States, Inc., as *amicus curiae*.

residential property in the Louisiana parishes of Jefferson or Orleans (the Greater New Orleans area) during the four years preceding the filing of the complaint. The respondents are two real estate trade associations, six named real estate firms, and that class of real estate brokers who at some time during the period covered by the complaint transacted realty brokerage business in the Greater New Orleans area and charged a brokerage fee for their services. The unlawful conduct alleged is a continuing combination and conspiracy among the respondents to fix, control, raise, and stabilize prices for the purchase and sale of residential real estate by the systematic use of fixed commission rates, widespread fee splitting, suppression of market information useful to buyers and sellers, and other allegedly anticompetitive practices. The complaint asserts that respondents' conduct has injured petitioners in their business or property because the fees and commissions charged for brokerage services have been maintained at an artificially high and noncompetitive level, with the effect that the prices of residential properties have been artificially raised. The complaint seeks treble damages and injunctive relief as authorized by §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, 15 U. S. C. §§ 15, 26.

The allegations of the complaint pertinent to establishing federal jurisdiction are:

(1) that the activities of the respondents are "within the flow of interstate commerce and have an effect upon that commerce";

(2) that the services of respondents were employed in connection with the purchase and sale of real estate by "persons moving into and out of the Greater New Orleans area";

(3) that respondents "assist their clients in securing financing and insurance involved with the purchase of real estate in the Greater New Orleans area," which "financing and insurance are obtained from sources outside the State of Louisiana and move in interstate commerce into the State of Louisiana through the activities of the [respondents]"; and

(4) that respondents have engaged in an unlawful restraint of "interstate trade and commerce in the offering for sale and sale of real estate brokering services."

Respondents moved in the District Court to dismiss the complaint for failure to state a claim within the ambit of the Sherman Act. This motion was supported by a memorandum and by the affidavits of two officers of respondent Real Estate Board of New Orleans. The affiants testified that real estate brokers in Louisiana were licensed to perform their function in that State only, that there was no legal or other requirement that real estate brokers be employed in connection with the purchase or sale of real estate within Louisiana, and that the affiants had personal knowledge of such transactions occurring without the assistance of brokers. The function of real estate brokers was described as essentially completed when buyer and seller had been brought together on agreeable terms. The affiants also stated that real estate brokers did not obtain and were not instrumental in obtaining financing of credit sales, save in a few special cases, nor were they involved with examination of titles in connection with the sale of real estate or the financing of such sales.

The memorandum in support of the motion to dismiss sought to distinguish this case from *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), in which we held that § 1 of the Sherman Act had been violated by conformance with a bar association's minimum-fee schedule that established fees for title examination services performed by attorneys in connection with the financing of real estate purchases. The respondents construed the applicability of *Goldfarb* as limited by certain language in the opinion that described the activities of lawyers in the examination of titles as an inseparable and integral part of the interstate commerce in real estate financing. 421 U. S., at 784–785. In contrast, with respect to this case, respondents asserted on the basis of the affidavits that "the role of . . . real estate brokers in financing such purchases is neither integral nor inseparable." Respondents

contended (1) that the activities of respondent real estate brokers were purely local in nature; (2) that the allegation that respondents assisted in securing financing or insurance in connection with the purchase of real estate had been controverted by the affidavits; and (3) that the conclusory assertion in the complaint that respondents' activities "are within the flow of interstate commerce and have an effect upon that commerce" was insufficient by itself to establish federal jurisdiction.

Petitioners' response to the motion to dismiss asserted that since adequate pretrial discovery up to that time had been precluded pursuant to a pretrial order, petitioners had not had a full opportunity to substantiate the jurisdictional allegations of their complaint. Petitioners advanced two independent theories to support federal jurisdiction: (1) that respondents' activities occurred within the stream of interstate commerce; and (2) that even if respondents' activities were wholly local in character they depended upon and affected the interstate flow of both services and people.

Accompanying the response was an affidavit stating that one of the named petitioners had employed the services of a respondent real estate broker to assist in an interstate relocation. There was also an affidavit from a loan guarantee officer of the Veterans' Administration disclosing that VA-insured loans for residential purchases in the Greater New Orleans area for the years 1973–1975 amounted to $46.3 million, $45.9 million, and $53.5 million, respectively.

After briefing on the jurisdictional issue, the District Court heard oral argument and received postargument briefs. The court then held a conference with counsel, the substance of which was carefully recorded in the minute entries by the District Judge:

> "The Court advised counsel that it appears plaintiffs may satisfy said jurisdictional requirement only by bringing the facts of this case within the parameters of the

> Supreme Court's holding in *Goldfarb v. Virginia State Bar*. . . . It is recognized, however, that further discovery is needed on the issue of *Goldfarb's* applicability *sub judice*. More specifically, such discovery should determine whether, in the first place, there is the requisite interdependence between the brokerage activity of defendants and the financing and/or insuring of real estate transactions in the New Orleans area and, secondly, whether there is a substantial involvement of interstate commerce in such real estate transactions *via* the financing and/or insurance aspects thereof."

Following this conference, petitioners deposed nine witnesses, who produced various documents. The deponents included government officials, real estate brokers, mortgage lenders, and real estate title insurers. This evidence was directed to establishing that an appreciable amount of interstate commerce was involved in various aspects of the purchase and sale of residential property in the Greater New Orleans area.

The deposition testimony of the president of Security Homestead Association, one of nearly 40 savings and loan institutions in the Greater New Orleans area, revealed that during the period covered by the complaint the Association lent in excess of $100 million for local purchases of residential property. The Association obtained loan capital from deposits by investors, some of whom lived out of state, and from borrowings from the Federal Home Loan Bank of Little Rock, Ark. Toward the close of the relevant period, the Association entered the interstate secondary mortgage market, in which existing mortgages were sold to raise new capital for future loans.

Another deponent was the president of Carruth Mortgage Corp., an Arkansas corporation doing business in Louisiana, Mississippi, and Texas. Its business was to originate home loans, then to sell the financial paper in the secondary mortgage market. The testimony showed that during the

relevant period Carruth made in excess of $100 million in loans on residential real estate in the Greater New Orleans area. The overwhelming proportion of these home loans was guaranteed by either the Federal Housing Administration or the Veterans' Administration. With respect to the FHA-guaranteed loans, Carruth collected and remitted premiums for the guarantee to the FHA in Washington, D. C., on a periodic basis for each account.

Both deponents testified that real estate brokers often play a role in securing financing information on behalf of a borrower and in bringing borrower and lender together, but that after the introductory phases the substance of the mortgage transaction progressed without the involvement of a real estate broker. The president of Carruth testified that his company required title insurance on all the home loans it made. This testimony was accompanied by the deposition of the president of Lawyers Title Insurance Co. of Louisiana, which revealed that each of the nearly 30 title insurance companies then writing coverage in the Greater New Orleans area was a subsidiary or branch of a corporation in another state.

Following the close of the discovery period and the filing of additional briefs, the District Court took the matter under submission and, having considered the memoranda of counsel and the relevant documents of record, issued a memorandum opinion and order granting the motion to dismiss the complaint. 432 F. Supp. 982 (1977). The court stated that the ground upon which respondents had challenged jurisdiction was that "brokerage activities are wholly intrastate in nature and, since they neither occur in nor substantially affect interstate commerce, are beyond the ambit of federal anti-trust prohibition." *Id.*, at 983. In line with the view expressed at the earlier conference, see *supra*, at 237–238, the District Court viewed the jurisdictional inquiry as narrowly confined: the question was whether the facts of this case

could be brought within the *Goldfarb* holding. In the District Court's view, "any inquiry based upon [*Goldfarb*] must be twofold: 1) whether a 'substantial' volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity is an essential, integral part of the transaction and inseparable from its interstate aspects." 432 F. Supp., at 984. The District Court assumed, *arguendo*, that the title insurance and financing aspects of the New Orleans residential real estate market were interstate in character, but ruled that federal jurisdiction was not established because in its view "the inescapable conclusion to be drawn from the evidence is that the participation of the broker in these (presumably interstate) phases of the real estate transaction is an incidental rather than indispensable occurrence in the transactional chain of events." *Id.*, at 985.

The United States Court of Appeals for the Fifth Circuit affirmed the dismissal of the complaint. 583 F. 2d 1315 (1978). Examining first the specific acts complained of in this case, the Court of Appeals concluded that they failed to satisfy the "in commerce" test. Realty was viewed as a quintessentially local product, and the brokerage activity described in the pleadings was found to occur wholly intrastate. *Id.*, at 1319. Second, that court rejected petitioners' "effect on commerce" argument. The interpretation of *Goldfarb* that had guided the District Court's analysis was adopted by the Court of Appeals, which ruled that "unlike the attorneys in *Goldfarb* whose participation in title insurance was statutorily mandated, real estate brokers are neither necessary nor integral participants in the 'interstate aspects' of realty financing and insurance." 583 F. 2d, at 1321–1323.

The Court of Appeals noted that the District Court had styled its judgment as a dismissal under Federal Rule of Civil Procedure 12 (b)(6) for failure to state a claim upon which relief could be granted, to be treated as a summary judgment insofar as matters outside of the pleadings were considered.

The Court of Appeals concluded that the appropriate designation of the dismissal was for lack of subject-matter jurisdiction under Rule 12 (b)(1), and affirmed the dismissal on that basis.

We granted certiorari. 441 U. S. 942.

II

A

The broad authority of Congress under the Commerce Clause has, of course, long been interpreted to extend beyond activities actually *in* interstate commerce to reach other activities that, while wholly local in nature, nevertheless substantially *affect* interstate commerce. *Wickard* v. *Filburn*, 317 U. S. 111 (1942); *United States* v. *Darby*, 312 U. S. 100 (1941). This Court has often noted the correspondingly broad reach of the Sherman Act. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S. 738, 743 (1976); *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954); *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944); *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427, 435 (1932). During the near century of Sherman Act experience, forms and modes of business and commerce have changed along with changes in communication and travel, and innovations in methods of conducting particular businesses have altered relationships in commerce. Application of the Act reflects an adaptation to these changing circumstances. Compare *United States* v. *E. C. Knight Co.*, 156 U. S. 1, 12–15 (1895), and *Hopkins* v. *United States*, 171 U. S. 578, 587–592 (1898), with *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 231–235 (1948), and *United States* v. *Employing Plasterers Assn.*, *supra*, at 189.

The conceptual distinction between activities "in" interstate commerce and those which "affect" interstate commerce has been preserved in the cases, for Congress has seen fit to pre-

serve that distinction in the antitrust and related laws by limiting the applicability of certain provisions to activities demonstrably "in commerce." *United States* v. *American Building Maintenance Industries*, 422 U. S. 271 (1975); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U. S. 186 (1974); *FTC* v. *Bunte Bros., Inc.*, 312 U. S. 349 (1941). It can no longer be doubted, however, that the jurisdictional requirement of the Sherman Act may be satisfied under either the "in commerce" or the "effect on commerce" theory. *Hospital Building Co.* v. *Rex Hospital Trustees, supra*, at 743; *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 194–195; *United States* v. *Women's Sportswear Manufacturers Assn.*, 336 U. S. 460, 464 (1949); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co., supra*, at 235–237.

Although the cases demonstrate the breadth of Sherman Act prohibitions, jurisdiction may not be invoked under that statute unless the relevant aspect of interstate commerce is identified; it is not sufficient merely to rely on identification of a relevant local activity and to presume an interrelationship with some unspecified aspect of interstate commerce. To establish jurisdiction a plaintiff must allege the critical relationship in the pleadings and if these allegations are controverted must proceed to demonstrate by submission of evidence beyond the pleadings either that the defendants' activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce. *Gulf Oil Corp.* v. *Copp Paving Co., supra*, at 202.

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that

are alleged to be unlawful. The validity of this approach is confirmed by an examination of the case law. If establishing jurisdiction required a showing that the unlawful conduct itself had an effect on interstate commerce, jurisdiction would be defeated by a demonstration that the alleged restraint failed to have its intended anticompetitive effect. This is not the rule of our cases. See *American Tobacco Co.* v. *United States*, 328 U. S. 781, 811 (1946); *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225, n. 59 (1940). A violation may still be found in such circumstances because in a civil action under the Sherman Act, liability may be established by proof of *either* an unlawful purpose or an anticompetitive effect. *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 436, n. 13 (1978); see *United States* v. *Container Corp.*, 393 U. S. 333, 337 (1969); *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 489 (1950); *United States* v. *Socony-Vacuum Oil Co., supra*, at 224–225, n. 59.

Nor is jurisdiction defeated in a case relying on anticompetitive effects by plaintiff's failure to quantify the adverse impact of defendant's conduct. See *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 123–125 (1969); *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U. S. 251, 265–266 (1946). Even where there is an inability to prove that concerted activity has resulted in legally cognizable damages, jurisdiction need not be impaired, though such a failure may confine the available remedies to injunctive relief. See *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 452–463 (1945); *Keogh* v. *Chicago & N. W. R. Co.*, 260 U. S. 156 (1922).

B

The interpretation and application of our holding in *Goldfarb* v. *Virginia State Bar*, 421 U. S. 773 (1975), has figured prominently in this case. The District Court held that petitioners could establish federal jurisdiction only if the facts of

this case could be brought within *Goldfarb*. As previously noted, as interpreted by that court, "any inquiry based upon [*Goldfarb*] must be twofold: 1) whether a 'substantial' volume of interstate commerce is involved in the overall real estate transaction, and 2) whether the challenged activity is an essential, intergral part of the transaction and inseparable from its interstate aspects." 432 F. Supp., at 984. The Court of Appeals took a similar view of *Goldfarb*, holding that Sherman Act jurisdiction did not exist because petitioners had failed to demonstrate that real estate brokers are either necessary or integral participants in the interstate aspects of residential real estate financing and title insurance. 583 F. 2d, at 1322.

It is with the second phase of the analysis of the District Court and of the Court of Appeals that we disagree. The facts of *Goldfarb* revealed an application of the state bar association's minimum-fee schedule to fix fees for attorneys' title examination services. Since the financing depended on a valid and insured title we concluded that title examination was "an integral part" of the interstate transaction of obtaining financing for the purchase of residential property and, because of the "inseparability" of the attorneys' services from the title examination process, we held that the legal services were in turn an "integral part of an interstate transaction." 421 U. S., at 784–785. By placing the *Goldfarb* holding on the available ground that the activities of the attorneys were within the stream of interstate commerce, Sherman Act jurisdiction was established. The *Goldfarb* holding was not addressed to the "effect on commerce" test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce. To adopt the restrictive interpretation urged upon us by respondents would return to a jurisdictional analysis under the Sherman Act of an era long past. It has been more than 30 years since this Court stated: "At this late day we are not

willing to take that long backward step." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S., at 235.

C

On the record thus far made, it cannot be said that there is an insufficient basis for petitioners to proceed at trial to establish Sherman Act jurisdiction. It is clear that an appreciable amount of commerce is involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property. The presidents of two of the many lending institutions in the area stated in their deposition testimony that those institutions committed hundreds of millions of dollars to residential financing during the period covered by the complaint. The testimony further demonstrates that this appreciable commercial activity has occurred in interstate commerce. Funds were raised from out-of-state investors and from interbank loans obtained from interstate financial institutions. Multistate lending institutions took mortgages insured under federal programs which entailed interstate transfers of premiums and settlements. Mortgage obligations physically and constructively were traded as financial instruments in the interstate secondary mortgage market. Before making a mortgage loan in the Greater New Orleans area, lending institutions usually, if not always, required title insurance, which was furnished by interstate corporations. Reading the pleadings, as supplemented, most favorably to petitioners, for present purposes we take these facts as established.

At trial, respondents will have the opportunity, if they so choose, to make their own case contradicting this factual showing. On the other hand, it may be possible for petitioners to establish that, apart from the commerce in title insurance and real estate financing, an appreciable amount of interstate commerce is involved with the local residential real estate market arising out of the interstate movement of people, or otherwise.

To establish federal jurisdiction in this case, there remains only the requirement that respondents' activities which allegedly have been infected by a price-fixing conspiracy be shown "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved. *Hospital Building Co.* v. *Rex Hospital Trustees*, 425 U. S., at 745; see *Goldfarb* v. *Virginia State Bar*, *supra*, at 784, n. 11; *Burke* v. *Ford*, 389 U. S. 320, 321–322 (1967). It is clear, as the record shows, that the function of respondent real estate brokers is to bring the buyer and seller together on agreeable terms. For this service the broker charges a fee generally calculated as a percentage of the sale price. Brokerage activities necessarily affect both the frequency and the terms of residential sales transactions. Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce.

It is axiomatic that a complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U. S. 41, 45–46 (1957); see 5 C. Wright & A. Miller, Federal Practice and Procedure §§ 1202, 1205–1207, 1215–1224, 1228 (1969). This rule applies with no less force to a Sherman Act claim, where one of the requisites of a cause of action is the existence of a demonstrable nexus between the defendants' activity and interstate commerce. Here, what was submitted to the District Court shows a sufficient basis for satisfying the Act's jurisdictional requirements under the effect-on-commerce theory so as to

entitle the petitioners to go forward. We therefore conclude that it was error to dismiss the complaint at this stage of the proceedings. The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

THOMPSON *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 79–5180. Decided January 14, 1980

The Court of Appeals, in affirming petitioner's conviction, accepted the Government's position that there had been no violation of the Department of Justice's *"Petite"* policy—whereby United States attorneys are forbidden to prosecute any person if the allegedly criminal behavior was an ingredient of a previous state prosecution against that person (as in the instant case), except where federal prosecution is specifically authorized in advance by the Department itself upon a finding that the prosecution will serve compelling interests of federal law enforcement. But in this Court the Solicitor General conceded that the United States Attorney had not obtained the proper authorization before bringing the prosecution.

Held: This Court will vacate the Court of Appeals' judgment and remand the case for that court's reconsideration in light of the Government's present position, rather than, as requested by the Government, vacate the Court of Appeals' judgment and remand the case to the District Court with instructions to grant the Government's motion to dismiss the indictment.

Certiorari granted; 601 F. 2d 591, vacated and remanded.

PER CURIAM.

The Department of Justice has a firmly established policy, known as the *"Petite"* policy, under which United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of a previous state prosecution against that person. An exception is made only if the federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve "compelling interests of federal law enforcement." [1]

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[1] Promulgated in the wake of this Court's decision in *Abbate* v. *United States*, 359 U. S. 187 (1959), the policy was first recognized by the Court

In this case the Solicitor General has advised us that this established Department policy was violated. Accordingly, he urges the Court "to permit the effectuation of the government's policy against successive prosecutions by granting the petition, vacating the judgment of the court of appeals, and remanding the case to the district court with instructions to grant the government's motion to dismiss the indictment."

In 1978, the petitioner was brought to trial in a Kentucky court on a charge of armed burglary, and was convicted by a jury of a lesser included offense. He was then prosecuted and convicted in a Federal District Court on a charge of unlawfully possessing a firearm—a charge that grew out of the same criminal transaction that had been the basis of the Kentucky prosecution. This federal conviction was affirmed by the Court of Appeals for the Sixth Circuit, which accepted the Government's then position that the *"Petite"* policy had not been violated.[2]

The Solicitor General now concedes that the United States Attorney did not obtain the authorization required under the established Department policy before bringing the federal prosecution. Moreover, "after careful review" of whether to grant *nunc pro tunc* authorization, the Solicitor General has concluded that "petitioner's prosecution for unlawfully possessing a firearm was not supported by an independent compelling federal interest not satisfied by the state prosecution for armed burglary."

Ever since the Justice Department established the *"Petite"* policy in 1959, the Court has consistently responded to requests by the Government in cases such as this by granting certiorari and vacating the judgments. See, *e. g., Hammons* v. *United States,* 439 U. S. 810 (1978); *Frakes* v. *United*

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in *Petite* v. *United States,* 361 U. S. 529, 531 (1960). It has since been known as the *"Petite"* policy.

[2] The *per curiam* opinion of the Court of Appeals is unreported, but the affirmance order is reported at 601 F. 2d 591.

States, 435 U. S. 911 (1978); *Rinaldi* v. *United States*, 434 U. S. 22 (1977); *Croucher* v. *United States*, 429 U. S. 1034 (1977); *Watts* v. *United States*, 422 U. S. 1032 (1975); *Ackerson* v. *United States*, 419 U. S. 1099 (1975); *Hayles* v. *United States*, 419 U. S. 892 (1974); *Thompson* v. *United States*, 400 U. S. 17 (1970); *Marakar* v. *United States*, 370 U. S. 723 (1962); *Petite* v. *United States*, 361 U. S. 529 (1960).

This practice, which rests on the power of the Court to "afford relief which is 'just under the circumstances,' 28 U. S. C. § 2106," *Rinaldi* v. *United States*, *supra*, at 25, n. 8, is not unique to violations of the *"Petite"* policy. The Court has also consistently vacated the judgments in other cases which the Solicitor General has represented were in violation of other Justice Department policies. See, *e. g.*, *Blucher* v. *United States*, 439 U. S. 1061 (1979) (obscenity prosecution); *Nunley* v. *United States*, 434 U. S. 962 (1977) (prosecution for willfully making false statements concerning matters within jurisdiction of Department of Treasury); *Margraf* v. *United States*, 414 U. S. 1106 (1973) (prosecution for carrying a "concealed deadly or dangerous" weapon while boarding an aircraft); *Robison* v. *United States*, 390 U. S. 198 (1968) (addition of counts upon retrial); *Redmond* v. *United States*, 384 U. S. 264 (1966) (obscenity prosecution).

The instant case differs from this long line of decisions only in that here the Government mistakenly, and successfully, represented to the Court of Appeals that Justice Department policy had not been violated. Because of this circumstance, we do not accept the Solicitor General's suggestion. Rather, in response to his suggestion and upon an independent examination of the record, we grant leave to proceed *in forma pauperis* and certiorari, vacate the judgment, and remand the case to the Court of Appeals for reconsideration in light of the Government's present position. This course is one that the Court has frequently taken when, as here, the Government has changed its position while a criminal case is pending on

petition for certiorari. See, *e. g., Garner* v. *United States,* 430 U. S. 942 (1977).

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE WHITE dissent.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissents for the reason that in this case the United States already has presented the *"Petite"* policy issue to the Court of Appeals and that court has passed upon the issue adversely to the Government's present position.

VANCE, SECRETARY OF STATE *v.* TERRAZAS

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78–1143. Argued October 30, 1979—Decided January 15, 1980

Section 349 (a)(2) of the Immigration and Nationality Act provides that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." Section 349 (c) provides that the party claiming that such loss of citizenship occurred must "establish such claim by a preponderance of the evidence" and that a person who commits any act of expatriation "shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." Appellee, who was a citizen of both the United States and Mexico at birth, subsequently obtained a certificate of Mexican citizenship after executing an application in which he swore allegiance to Mexico and expressly renounced his United States citizenship. Thereafter, the Department of State issued a certificate of loss of nationality, and the Board of Appellate Review of the Department of State affirmed. Appellee then brought suit for a declaration of his United States nationality, but the District Court concluded that the United States had proved by a preponderance of the evidence that appellee had knowingly and voluntarily taken an oath of allegiance to Mexico and renounced allegiance to the United States, thus voluntarily relinquishing United States citizenship pursuant to § 349 (a)(2). The Court of Appeals reversed and remanded, holding that Congress had no power to legislate the evidentiary standard contained in § 349 (c) and that the Constitution required that proof be not merely by a preponderance of the evidence, but by "clear, convincing and unequivocal evidence."

Held:

1. In establishing loss of citizenship, the Government must prove an intent to surrender United States citizenship, not just the voluntary commission of an expatriating act such as swearing allegiance to a foreign nation. Congress does not have any general power to take away an American citizen's citizenship without his "assent," which means an intent to relinquish citizenship, whether the intent is expressed in

words or is found as a fair inference from his conduct. The expatriating acts specified in § 349 (a) cannot be treated as conclusive evidence of the indispensable voluntary assent of the citizen. The trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship. Cf. *Afroyim* v. *Rusk*, 387 U. S. 253. Pp. 258–263.

2. However, the Constitution permits Congress to prescribe the standard of proof in expatriation proceedings. The specific evidentiary standard provided in § 349 (c) is not invalid under either the Citizenship Clause of the Fourteenth Amendment or the Due Process Clause of the Fifth Amendment. Although the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence in criminal and involuntary commitment contexts, nevertheless expatriation proceedings are civil in nature and do not threaten a loss of liberty, and thus Congress did not exceed its powers by requiring proof of an intentional expatriating act by only a preponderance of evidence. Pp. 264–267.

3. Nor is the presumption of voluntariness provided in § 349 (c) constitutionally infirm. While the statute provides that any of the statutory expatriating acts, if proved, is presumed to have been committed voluntarily, it does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship, which matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence. Section 349 (c) and its legislative history make clear that Congress preferred the ordinary rule that voluntariness of an act is presumed and that duress is an affirmative defense to be proved by the party asserting it, and to invalidate the rule here would give the Citizenship Clause far more scope in this context than the relevant circumstances that brought the Fourteenth Amendment into being would suggest appropriate. Pp. 267–270.

577 F. 2d 7, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., *post*, p. 270, and STEVENS, J., *post*, p. 272, filed opinions concurring in part and dissenting in part. BRENNAN, J., filed a dissenting opinion, in Part II of which STEWART, J., joined, *post*, p. 274. STEWART, J., filed a dissenting statement, *post*, p. 270.

Allan A. Ryan, Jr., argued the cause for appellant. With him on the briefs were *Solicitor General McCree, Assistant*

Attorney General Heymann, Deputy Solicitor General Geller, William G. Otis, and *William C. Brown.*

Kenneth K. Ditkowsky argued the cause and filed a brief for appellee.

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 349 (a)(2) of the Immigration and Nationality Act (Act), 66 Stat. 267, 8 U. S. C. § 1481 (a)(2), provides that "a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by . . . taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof." The Act also provides that the party claiming that such loss of citizenship occurred must "establish such claim by a preponderance of the evidence" and that the voluntariness of the expatriating conduct is rebuttably presumed. § 349 (c), as added, 75 Stat. 656, 8 U. S. C. § 1481 (c).[1] The

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[1] The relevant statutory provisions are §§ 349 (a)(2), (c) of the Act, 66 Stat. 267, as amended, 75 Stat. 656, as set forth in 8 U. S. C. § 1481:

"(a) From and after the effective date of this chapter a person who is a national of the United States whether by birth or naturalization, shall lose his nationality by—

. . . . . .

"(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof;

. . . . . .

"(c) Whenever the loss of United States nationality is put in issue in any action or proceeding commenced on or after September 26, 1961 under, or by virtue of, the provisions of this chapter or any other Act, the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence. Except as otherwise provided in subsection (b) of this section, any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily."

issues in this case are whether, in establishing loss of citizenship under § 1481 (a)(2), a party must prove an intent to surrender United States citizenship and whether the United States Constitution permits Congress to legislate with respect to expatriation proceedings by providing the standard of proof and the statutory presumption contained in § 1481 (c).

I

Appellee, Laurence J. Terrazas, was born in this country, the son of a Mexican citizen. He thus acquired at birth both United States and Mexican citizenship. In the fall of 1970, while a student in Monterrey, Mexico, and at the age of 22, appellee executed an application for a certificate of Mexican nationality, swearing "adherence, obedience, and submission to the laws and authorities of the Mexican Republic" and "expressly renounc[ing] United States citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of the United States of America. . . ." App. to Brief for Appellant 5a.[2] The certificate, which issued upon this application on April 3, 1971, recited that Terrazas had sworn adherence to the United Mexican States and that he "has expressly renounced all rights inherent to any other nationality, as well as all submission, obedience, and loyalty to any foreign government, especially to those which have recognized him as that na-

[2] The application contained the following statement:

"I therefore hereby expressly renounce ..... citizenship, as well as any submission, obedience, and loyalty to any foreign government, especially to that of ....., of which I might have been subject, all protection foreign to the laws and authorities of Mexico, all rights which treaties or international law grant to foreigners; and furthermore I swear adherence, obedience, and submission to the laws and authorities of the Mexican Republic."

The blank spaces in the statement were filled in with the words "Estados Unidos" (United States) and "Norteamerica" (North America), respectively. Brief for Appellant 4.

tional." *Id.*, at 8a. Terrazas read and understood the certificate upon receipt. App. to Juris. Statement 21a.

A few months later, following a discussion with an officer of the United States Consulate in Monterrey, proceedings were instituted to determine whether appellee had lost his United States citizenship by obtaining the certificate of Mexican nationality. Appellee denied that he had, but in December 1971 the Department of State issued a certificate of loss of nationality. App. to Brief for Appellant 31a. The Board of Appellate Review of the Department of State, after a full hearing, affirmed that appellee had voluntarily renounced his United States citizenship. App. to Juris. Statement 31a. As permitted by § 360 (a) of the Act, 66 Stat. 273, 8 U. S. C. § 1503 (a), appellee then brought this suit against the Secretary of State for a declaration of his United States nationality. Trial was *de novo*.

The District Court recognized that the first sentence of the Fourteenth Amendment,[3] as construed in *Afroyim* v. *Rusk*, 387 U. S. 253, 268 (1967), " 'protect[s] every citizen of this Nation against a congressional forcible destruction of his citizenship' " and that every citizen has " 'a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship.' " App. to Juris. Statement 25a. A person of dual nationality, the District Court said, "will be held to have expatriated himself from the United States when it is shown that he voluntarily committed an act whereby he unequivocally renounced his allegiance to the United States." *Ibid.* Specifically, the District Court found that appellee had taken an oath of allegiance to Mexico, that he had "knowingly and understandingly renounced allegiance to the United States in connection with his Application for a Certificate of Mexican Nationality," *id.*, at 28a, and that "[t]he taking of

[3] The Fourteenth Amendment, § 1, reads: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

an oath of allegiance to Mexico and renunciation of a foreign country [*sic*] citizenship is a condition precedent under Mexican law to the issuance of a Certificate of Mexican Nationality." *Ibid.* The District Court concluded that the United States had "proved by a preponderance of the evidence that Laurence J. Terrazas knowingly, understandingly and voluntarily took an oath of allegiance to Mexico, and concurrently renounced allegiance to the United States," *id.*, at 29a, and that he had therefore "voluntarily relinquished United States citizenship pursuant to § 349 (a)(2) of the . . . Act." *Ibid.*

In its opinion accompanying its findings and conclusions, the District Court observed that appellee had acted "voluntarily in swearing allegiance to Mexico and renouncing allegiance to the United States," *id.*, at 25a, and that appellee "knew he was repudiating allegiance to the United States through his actions." *Ibid.* The court also said, relying upon and quoting from *United States* v. *Matheson*, 400 F. Supp. 1241, 1245 (SDNY 1975), aff'd, 532 F. 2d 809 (CA2), cert. denied, 429 U. S. 823 (1976), that "the declaration of allegiance to a foreign state in conjunction with the renunciatory language of United States citizenship 'would leave no room for ambiguity as to the intent of the applicant.'" App. to Juris. Statement 23a.

The Court of Appeals reversed. 577 F. 2d 7 (1978). As the Court of Appeals understood the law—and there appears to have been no dispute on these basic requirements in the Courts of Appeals—the United States had not only to prove the taking of an oath to a foreign state, but also to demonstrate an intent on appellee's part to renounce his United States citizenship. The District Court had found these basic elements to have been proved by a preponderance of the evidence; and the Court of Appeals observed that, "[a]ssuming that the proper [evidentiary] standards were applied, we are convinced that the record fully supports the court's findings." *Id.*, at 10. The Court of Appeals ruled, however, that under *Afroyim* v. *Rusk*, *supra*, Congress had no power to legislate the

evidentiary standard contained in § 1481 (c) and that the Constitution required that proof be not merely by a preponderance of the evidence, but by "clear, convincing and unequivocal evidence." 577 F. 2d, at 11. The case was remanded to the District Court for further proceedings.[4]

The Secretary took this appeal under 28 U. S. C. § 1252. Because the invalidation of § 1481 (c) posed a substantial constitutional issue, we noted probable jurisdiction. 440 U. S. 970.

II

The Secretary first urges that the Court of Appeals erred in holding that a "specific intent to renounce U. S. citizenship" must be proved "before the mere taking of an oath of allegiance could result in an individual's expatriation." 577 F. 2d, at 11.[5] His position is that he need prove only the

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[4] In remanding the case to the District Court, the Court of Appeals did not "necessarily requir[e] that court to conduct a new trial." 577 F. 2d, at 12. The Court of Appeals recognized that, even granting the higher standard of proof it had imposed on the District Court, the factual determinations already on the record might be adequate to permit consideration of the case on remand without the holding of another trial or evidentiary hearing. *Ibid.*

[5] The Court of Appeals' discussion of specific intent is submerged in its analysis of proper evidentiary standards. *Id.*, at 11. The absence of independent analysis undoubtedly resulted from the Secretary's failure to contend in either the District Court or the Court of Appeals that it was unnecessary to prove an intent to relinquish citizenship. Indeed, the jurisdictional statement filed by the Secretary in this Court presented the single question whether 8 U. S. C. § 1481 (c) is unconstitutional under the Citizenship Clause of the Fourteenth Amendment; it did not present separately the question whether proof of a specific intent to relinquish is essential to expatriation.

Our Rule 15 (1) (c) states that "[o]nly the questions set forth in the jurisdictional statement or fairly comprised therein will be considered by the court." The Secretary now argues that resolution of the intent issue is an essential, or at least an advisable, predicate to an intelligent resolution of the constitutionality of § 1481 (c). There is some merit in this position: arguably the intent issue is fairly comprised in the question set

voluntary commission of an act, such as swearing allegiance to a foreign nation, that "is so inherently inconsistent with the continued retention of American citizenship that Congress may accord to it its natural consequences, *i. e.*, loss of nationality." Brief for Appellant 24. We disagree.

In *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), the Court held that § 401 (e) of the Nationality Act of 1940, 54 Stat. 1168–1169, which provided that an American citizen "shall lose his nationality by . . . [v]oting in a political election in a foreign state," contravened the Citizenship Clause of the Fourteenth Amendment. Afroyim was a naturalized American citizen who lived in Israel for 10 years. While in that nation, Afroyim voted in a political election. He in consequence was stripped of his United States citizenship. Consistently with *Perez* v. *Brownell*, 356 U. S. 44 (1958), which had sustained § 401 (e), the District Court affirmed the power of Congress to expatriate for such conduct regardless of the citizen's intent to renounce his citizenship. This Court, however, in overruling *Perez*, "reject[ed] the idea . . . that, aside from the Four-

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forth in the jurisdictional statement. In any event, consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them. *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U. S. 313, 320, n. 6 (1971); *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 66, 68–69 (1938) (parties agreed that *Swift* v. *Tyson*, 16 Pet. 1 (1842), was still good law). Cf. *Vachon* v. *New Hampshire*, 414 U. S. 478 (1974); *Moragne* v. *States Marine Lines*, 398 U. S. 375 (1970); *Silber* v. *United States*, 370 U. S. 717 (1962). See generally R. Stern & E. Gressman, Supreme Court Practice §§ 6.27 and 7.14 (5th ed. 1978).

As will be more apparent below, the Secretary, represented in this Court by the Solicitor General, has changed his position on the intent issue since the decision of the Court of Appeals; and his present position is at odds with a 1969 opinion of the Attorney General, 42 Op. Atty. Gen. 397, which interpreted *Afroyim* v. *Rusk* and guided the administrative actions of the State Department and the Immigration and Naturalization Service. The issue of intent is important, the parties have briefed it, and we shall address it.

teenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent." *Afroyim* v. *Rusk*, *supra*, at 257. The *Afroyim* opinion continued: § 1 of the Fourteenth Amendment is "most reasonably . . . read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it." 387 U. S., at 262.

The Secretary argues that *Afroyim* does not stand for the proposition that a specific intent to renounce must be shown before citizenship is relinquished. It is enough, he urges, to establish one of the expatriating acts specified in § 1481 (a) because Congress has declared each of those acts to be inherently inconsistent with the retention of citizenship. But *Afroyim* emphasized that loss of citizenship requires the individual's "assent," 387 U. S., at 257, in addition to his voluntary commission of the expatriating act. It is difficult to understand that "assent" to loss of citizenship would mean anything less than an intent to relinquish citizenship, whether the intent is expressed in words or is found as a fair inference from proved conduct. *Perez* had sustained congressional power to expatriate without regard to the intent of the citizen to surrender his citizenship. *Afroyim* overturned this proposition. It may be, as the Secretary maintains, that a requirement of intent to relinquish citizenship poses substantial difficulties for the Government in performance of its essential task of determining who is a citizen. Nevertheless, the intent of the Fourteenth Amendment, among other things, was to define citizenship; and as interpreted in *Afroyim*, that definition cannot coexist with a congressional power to specify acts that work a renunciation of citizenship even absent an intent to renounce. In the last analysis, expatriation depends on the will of the citizen rather than on the will of Congress and its assessment of his conduct.

The Secretary argues that the dissent in *Perez*, which it is said the Court's opinion in *Afroyim* adopted, spoke of con-

duct so contrary to undivided allegiance to this country that it could result in loss of citizenship without regard to the intent of the actor and that "assent" should not therefore be read as a code word for intent to renounce. But *Afroyim* is a majority opinion, and its reach is neither expressly nor implicitly limited to that of the dissent in *Perez*. Furthermore, in his *Perez* dissent, Mr. Chief Justice Warren, in speaking of those acts that were expatriating because so fundamentally inconsistent with citizenship, concluded by saying that in such instances the "Government is simply giving formal recognition to the inevitable consequence of the citizen's own voluntary surrender of his citizenship." *Perez* v. *Brownell, supra,* at 69. This suggests that the Chief Justice's conception of "actions in derogation of undivided allegiance to this country," 356 U. S., at 68, in fact would entail an element of assent.

In any event, we are confident that it would be inconsistent with *Afroyim* to treat the expatriating acts specified in § 1481 (a) as the equivalent of or as conclusive evidence of the indispensable voluntary assent of the citizen. "Of course," any of the specified acts "may be highly persuasive evidence in the particular case of a purpose to abandon citizenship." *Nishikawa* v. *Dulles,* 356 U. S. 129, 139 (1958) (Black, J., concurring). But the trier of fact must in the end conclude that the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship.

This understanding of *Afroyim* is little different from that expressed by the Attorney General in his 1969 opinion explaining the impact of that case. 42 Op. Atty. Gen. 397. An "act which does not reasonably manifest an individual's transfer or abandonment of allegiance to the United States," the Attorney General said, "cannot be made a basis for expatriation." *Id.,* at 400. Voluntary relinquishment is "not confined to a written renunciation," but "can also be

manifested by other actions declared expatriative under the [A]ct, if such actions are in derogation of allegiance to this country." *Ibid.* Even in these cases, however, the issue of intent was deemed by the Attorney General to be open; and, once raised, the burden of proof on the issue was on the party asserting that expatriation had occurred. *Ibid.* "In each case," the Attorney General stated, "the administrative authorities must make a judgment, based on all the evidence, whether the individual comes within the terms of an expatriation provision and has in fact voluntarily relinquished his citizenship." *Id.*, at 401. It was under this advice, as the Secretary concedes, that the relevant departments of the Government have applied the statute and the Constitution to require an ultimate finding of an intent to expatriate. Brief for Appellant 56–57, n. 28.[6]

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[6] As the Secretary states in his brief, Brief for Appellant 57, n. 28, "both the State Department and the Immigration and Naturalization Service have adopted administrative guidelines that attempt to ascertain the individual's intent by taking into consideration the nature of the expatriating act and the individual's statements and actions made in connection with that act."

The State Department's guideline evidences a position on intent quite similar to that adopted here:

"In the light of the *Afroyim* decision and the Attorney General's Statement of Interpretation of that decision, the Department now holds that the taking of a *meaningful* oath of allegiance to a foreign state is highly persuasive evidence of an intent to transfer or abandon allegiance. The taking of an oath that is not meaningful does not result in expatriation. The meaningfulness of the oath must be decided by the Department on the individual merits of each case." Department of State, 8 Foreign Affairs Manual § 224.2, p. 2 (1970) (emphasis in original).

Cf. Immigration and Naturalization Service, Interpretations § 349.1 (d) (2), p. 6976.4 (1970) (characterizing *Afroyim* as overruling *Perez*'s holding "that expatriation could flow from a voluntary act even though the citizen did not intend thereby to relinquish his United States citizenship").

Contemporaneous academic commentary agreed that *Afroyim* imposed the requirement of intent to relinquish citizenship on a party seeking to

Accordingly, in the case now before us, the Board of Appellate Review of the State Department found that appellee not only swore allegiance to Mexico, but also intended to abandon his United States citizenship: "In consideration of the complete record, we view appellant's declaration of allegiance to Mexico and his concurrent repudiation of any and all submission, obedience, and loyalty to the United States as compelling evidence of a specific intent to relinquish his United States citizenship." App. to Juris. Statement 50a. This same view—that expatriation depends on the will of a citizen as ascertained from his words and conduct—was also reflected in the United States' response to the petition for certiorari in *United States* v. *Matheson*, 532 F. 2d 809, cert. denied, 429 U. S. 823 (1976).[7] Insofar as we are advised, this view remained the official position of the United States until the appeal in this case.

As we have said, *Afroyim* requires that the record support a finding that the expatriating act was accompanied by an intent to terminate United States citizenship. The submission of the United States is inconsistent with this holding, and we are unprepared to reconsider it.

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establish expatriation. See Comment, An Expatriation Enigma: Afroyim v. Rusk, 48 B. U. L. Rev. 295, 298 (1968); Note, Acquisition of Foreign Citizenship: The Limits of *Afroyim* v. *Rusk*, 54 Cornell L. Rev. 624, 624–625 (1969); The Supreme Court: 1966 Term, 81 Harv. L. Rev. 69, 126 (1967); Note, 29 Ohio St. L. J. 797, 801 (1968).

[7] In his response to the petition for certiorari in *Matheson*, the Solicitor General argued that "*Afroyim* broadly held that Congress has no power to prescribe any objective conduct that will automatically result in expatriation, absent the individual's voluntary relinquishment of citizenship. . . ." Brief in Opposition in *Matheson* v. *United States*, O. T. 1976, No. 75–1651, p. 8. In *Matheson*, it was maintained, "there is nothing in the record that would support a finding that decedent's application for a certificate of Mexican nationality was prompted by a specific intent to relinquish her American citizenship." *Id.*, at 7. Thus, the Solicitor General concluded no expatriation could be said to have taken place.

III

With respect to the principal issues before it, the Court of Appeals held that Congress was without constitutional authority to prescribe the standard of proof in expatriation proceedings and that the proof in such cases must be by clear and convincing evidence rather than by the preponderance standard prescribed in § 1481 (c). We are in fundamental disagreement with these conclusions.

In *Nishikawa* v. *Dulles*, 356 U. S. 129 (1958), an American-born citizen, temporarily in Japan, was drafted into the Japanese Army. The Government later claimed that, under § 401 (c) of the Nationality Act of 1940, 54 Stat. 1169, he had expatriated himself by serving in the armed forces of a foreign nation. The Government agreed that expatriation had not occurred if Nishikawa's army service had been involuntary. Nishikawa contended that the Government had to prove that his service was voluntary, while the Government urged that duress was an affirmative defense that Nishikawa had the burden to prove by overcoming the usual presumption of voluntariness. This Court held the presumption unavailable to the Government and required proof of a voluntary expatriating act by clear and convincing evidence.

Section 1481 (c) soon followed; its evident aim was to supplant the evidentiary standards prescribed by *Nishikawa*.[8]

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[8] The House Report accompanying § 1481 (c), H. R. Rep. No. 1086, 87th Cong., 1st Sess., 40 (1961), took direct aim at *Nishikawa*'s holding that "the Government must in each case prove voluntary conduct by clear, convincing and unequivocal evidence." *Nishikawa* v. *Dulles*, 356 U. S., at 138. The Report quoted with approval from Mr. Justice Harlan's dissenting opinion in *Nishikawa*:

"'Although the Court recognizes the general rule that consciously performed acts are presumed voluntary [citations omitted], it in fact alters this rule in all denationalization cases by placing the burden of proving voluntariness on the Government, thus relieving citizen-claimants in such cases from the duty of proving that their presumably voluntary acts were actually involuntary.

"'One of the prime reasons for imposing the burden of proof on the

The provision "sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government. The presumption of voluntariness under the proposed rules of evidence, would be rebuttable—similarly—by preponderance of the evidence. . . ." H. R. Rep. No. 1086, 87th Cong., 1st Sess., 41 (1961).

We see no basis for invalidating the evidentiary prescriptions contained in § 1481 (c). *Nishikawa* was not rooted in the Constitution. The Court noted, moreover, that it was acting in the absence of legislative guidance. *Nishikawa* v. *Dulles*, *supra*, at 135. Nor do we agree with the Court of Appeals that, because under *Afroyim* Congress is constitutionally devoid of power to impose expatriation on a citizen, it is also without power to prescribe the evidentiary standards to govern expatriation proceedings. 577 F. 2d, at 10. Although § 1481 (c) had been law since 1961, *Afroyim* did not address or advert to that section; surely the Court would have said so had it intended to construe the Constitution to exclude expatriation proceedings from the traditional powers of Congress to prescribe rules of evidence and standards of proof in the federal courts. This power, rooted in the au-

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party claiming involuntariness is that the evidence normally lies in his possession.

"'I . . . find myself compelled to dissent because in my opinion the majority's position can be squared neither with congressional intent nor with proper and well-established rules governing the burden of proof on the issue of duress.'" H. R. Rep. No. 1086, *supra*, at 41 (quoting *Nishikawa* v. *Dulles*, *supra*, at 144–145).

The Report continued:

"In order to forestall further erosion of the statute designed to preserve and uphold the dignity and the priceless value of U. S. citizenship, with attendant obligations, [§ 1481 (c)] sets up rules of evidence under which the burden of proof to establish loss of citizenship by preponderance of the evidence would rest upon the Government." H. R. Rep. No. 1086, *supra*, at 41. The Report concluded by describing the rebuttable presumption of voluntariness in § 1481 (c).

thority of Congress conferred by Art. 1, § 8, cl. 9, of the Constitution to create inferior federal courts, is undoubted and has been frequently noted and sustained. See, *e. g.*, *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 31 (1976); *Hawkins* v. *United States*, 358 U. S. 74, 78 (1958); *Tot* v. *United States*, 319 U. S. 463, 467 (1943).

We note also that the Court's opinion in *Afroyim* was written by Mr. Justice Black who, in concurring in *Nishikawa*, said that the question whether citizenship has been voluntarily relinquished is to be determined on the facts of each case and that Congress could provide rules of evidence for such proceedings. *Nishikawa* v. *Dulles*, *supra*, at 139. In this respect, we agree with Mr. Justice Black; and since Congress has the express power to enforce the Fourteenth Amendment, it is untenable to hold that it has no power whatsoever to address itself to the manner or means by which Fourteenth Amendment citizenship may be relinquished.

We are unable to conclude that the specific evidentiary standard provided by Congress in § 1481 (c) is invalid under either the Citizenship Clause or the Due Process Clause of the Fifth Amendment. It is true that in criminal and involuntary commitment contexts we have held that the Due Process Clause imposes requirements of proof beyond a preponderance of the evidence. *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975); *Addington* v. *Texas*, 441 U. S. 418 (1979). This Court has also stressed the importance of citizenship and evinced a decided preference for requiring clear and convincing evidence to prove expatriation. *Nishikawa* v. *United States*, *supra*. But expatriation proceedings are civil in nature and do not threaten a loss of liberty. Moreover, as we have noted, *Nishikawa* did not purport to be a constitutional ruling, and the same is true of similar rulings in related areas. *Woodby* v. *INS*, 385 U. S. 276, 285 (1966) (deportation); *Schneiderman* v. *United States*, 320 U. S. 118, 125 (1943) (denaturalization). None of these cases involved a congressional judg-

ment, such as that present here, that the preponderance standard of proof provides sufficient protection for the interest of the individual in retaining his citizenship. Contrary to the Secretary's position, we have held that expatriation requires the ultimate finding that the citizen has committed the expatriating act with the intent to renounce his citizenship. This in itself is a heavy burden, and we cannot hold that Congress has exceeded its powers by requiring proof of an intentional expatriating act by a preponderance of evidence.

IV

The Court of Appeals did not discuss separately the validity of the statutory presumption provided in § 1481 (c). By holding that the section was beyond the power of Congress, however, and by requiring that the expatriating act be proved voluntary by clear and convincing evidence, the Court of Appeals effectively foreclosed use of the § 1481 (c) presumption of voluntariness, not only in the remand proceedings in the District Court, but also in other expatriation proceedings in that Circuit. As we have indicated, neither the Citizenship Clause nor *Afroyim* places suits such as this wholly beyond the accepted power of Congress to prescribe rules of evidence in federal courts. We also conclude that the presumption of voluntariness provided in § 1481 (c) is not otherwise constitutionally infirm.

Section 1481 (c) provides in relevant part that "any person who commits or performs, or who has committed or performed, any act of expatriation under the provisions of this chapter or any other Act shall be presumed to have done so voluntarily, but such presumption may be rebutted upon a showing, by a preponderance of the evidence, that the act or acts committed or performed were not done voluntarily." In enacting § 1481 (c), Congress did not dispute the holding of *Nishikawa* that the alleged expatriating act—there, service in a foreign army—must be performed voluntarily, but it did

insist that the Government have the benefit of the usual presumption of voluntariness and that one claiming that his act was involuntary make out his claim of duress by a preponderance of the evidence.

It is important at this juncture to note the scope of the statutory presumption. Section 1481 (c) provides that any of the statutory expatriating acts, if proved, are presumed to have been committed voluntarily. It does not also direct a presumption that the act has been performed with the intent to relinquish United States citizenship. That matter remains the burden of the party claiming expatriation to prove by a preponderance of the evidence. As so understood, we cannot invalidate the provision.[9]

The majority opinion in *Nishikawa* referred to the "ordinary rule that duress is a matter of affirmative defense" to be proved by the party claiming the duress. *Nishikawa* v. *Dulles*, 356 U. S., at 134. Justices Frankfurter and Burton, concurring in the result, also referred to the "ordinarily controlling principles of evidence [that] would suggest that the individual, who is peculiarly equipped to clarify an ambiguity in the meaning of outward events, should have the burden of proving what his state of mind was." *Id.*, at 141. And Mr. Justice Harlan, in dissent with Mr. Justice Clark, pointed to the "general rule that consciously performed acts are presumed voluntary" and referred to Federal Rule of Civil Procedure 8 (c), which treats duress as a matter of affirmative defense. 356 U. S., at 144. Yet the Court in *Nishikawa*,

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[9] The Secretary asserts that the § 1481 (c) presumption cannot survive constitutional scrutiny if we hold that intent to relinquish citizenship is a necessary element in proving expatriation. Brief for Appellant 26. The predicate for this assertion seems to be that § 1481 (c) presumes intent to relinquish as well as voluntariness. We do not so read it. Even if we did, and even if we agreed that presuming the necessary intent is inconsistent with *Afroyim*, it would be unnecessary to invalidate the section insofar as it presumes that the expatriating act itself was performed voluntarily.

because it decided that "the consequences of denationalization are so drastic" and because it found nothing indicating a contrary result in the legislative history of the Nationality Act of 1940, held that the Government must carry the burden of proving that the expatriating act was performed voluntarily. *Id.*, at 133–138.[10]

Section 1481 (c), which was enacted subsequently, and its legislative history, H. R. Rep. No. 1086, 87th Cong., 1st Sess., 40–41 (1961), make clear that Congress preferred the ordinary rule that voluntariness is presumed and that duress is an affirmative defense to be proved by the party asserting it. See *Hartsville Oil Mill* v. *United States*, 271 U. S. 43, 49–50 (1926); *Towson* v. *Moore*, 173 U. S. 17, 23–24 (1899); *Savage* v. *United States*, 92 U. S. 382, 387–388 (1876). "Duress, if proved, may be a defence to an action . . . but the burden of proof to establish the charge . . . is upon the party making it. . . ." *Mason* v. *United States*, 17 Wall. 67, 74 (1873).[11] The rationality of the procedural rule with respect to claims of involuntariness in ordinary civil cases cannot be doubted. To invalidate the rule here would be to disagree flatly with Con-

[10] The Court's departure from the normal rule that duress is an affirmative defense to be proved by the party seeking to rely on it was noted when *Nishikawa* was handed down. See The Supreme Court: 1957 Term, 72 Harv. L. Rev. 77, 166, 171 (1958) (*Nishikawa* "not only extended the Government's burden in expatriation proceedings to include the absence of duress if this issue is raised, but also determined the standard by which it must be shown. The position of the majority runs counter to the usual rule that duress is an affirmative defense").

[11] The rule that duress is an affirmative defense to be pleaded and proved by the party attempting to rely on it is well established. Even where a plaintiff's complaint improperly contains allegations that seek to avoid or defeat a potential affirmative defense, "it is inappropriate for the court to shift the burden of proof on the anticipated defense to plaintiff as a 'sanction' for failing to follow the burden of pleading structure established by Rule 8 or by adopting the fiction that plaintiff's anticipation of the issue evidences his intention to 'assume' the burden of proving it." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1276, p. 327 (1969). On affirmative defenses generally, see *id.*, § 1270, at 289 *et seq.*

gress on the balance to be struck between the interest in citizenship and the burden the Government must assume in demonstrating expatriating conduct. It would also constitutionalize that disagreement and give the Citizenship Clause of the Fourteenth Amendment far more scope in this context than the relevant circumstances that brought the Amendment into being would suggest appropriate. Thus we conclude that the presumption of voluntariness included in § 1481 (c) has continuing vitality.

V

In sum, we hold that in proving expatriation, an expatriating act and an intent to relinquish citizenship must be proved by a preponderance of the evidence. We also hold that when one of the statutory expatriating acts is proved, it is constitutional to presume it to have been a voluntary act until and unless proved otherwise by the actor. If he succeeds, there can be no expatriation. If he fails, the question remains whether on all the evidence the Government has satisfied its burden of proof that the expatriating act was performed with the necessary intent to relinquish citizenship.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

MR. JUSTICE STEWART dissents for the reasons stated in Part II of MR. JUSTICE BRENNAN's dissenting opinion, which he joins.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

I agree with the Court's holding that a citizen of the United States may not lose his citizenship in the absence of a finding that he specifically intended to renounce it. I also concur in the adoption of a saving construction of 8 U. S. C. § 1481

(a)(2) to require that the statutorily designated expatriating acts be done with a specific intent to relinquish citizenship.

I cannot, however, accept the majority's conclusion that a person may be found to have relinquished his American citizenship upon a preponderance of the evidence that he intended to do so. The Court's discussion of congressional power to "prescribe rules of evidence and standards of proof in the federal courts," *ante*, at 265, is the beginning, not the end, of the inquiry. It remains the task of this Court to determine when those rules and standards impinge on constitutional rights. As my Brother STEVENS indicates, the Court's casual dismissal of the importance of American citizenship cannot withstand scrutiny. And the mere fact that one who has been expatriated is not locked up in a prison does not dispose of the constitutional inquiry. As Mr. Chief Justice Warren stated over 20 years ago:

> "[T]he expatriate has lost the right to have rights.
>
> "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." *Trop* v. *Dulles*, 356 U. S. 86, 102 (1958) (plurality opinion) (footnotes omitted).

For these reasons I cannot understand, much less accept, the Court's suggestion that "expatriation proceedings . . . do not threaten a loss of liberty." *Ante*, at 266. Recognizing that

a standard of proof ultimately "'reflects the value society places'" on the interest at stake, *Addington* v. *Texas*, 441 U. S. 418, 425 (1979), I would hold that a citizen may not lose his citizenship in the absence of clear and convincing evidence that he intended to do so.

MR. JUSTICE STEVENS, concurring in part and dissenting in part.

The Court today unanimously reiterates the principle set forth in *Afroyim* v. *Rusk*, 387 U. S. 253, that Congress may not deprive an American of his citizenship against his will, but may only effectuate the citizen's own intention to renounce his citizenship. I agree with the Court that Congress may establish certain standards for determining whether such a renunciation has occurred. It may, for example, provide that expatriation can be proved by evidence that a person has performed an act that is normally inconsistent with continued citizenship and that the person thereby specifically intended to relinquish his American citizenship.

I do not agree, however, with the conclusion that Congress has established a permissible standard in 8 U. S. C. § 1481 (a)(2). Since we accept dual citizenship, taking an oath of allegiance to a foreign government is not necessarily inconsistent with an intent to remain an American citizen. Moreover, as now written, the statute cannot fairly be read to require a finding of specific intent to relinquish citizenship. The statute unambiguously states that

> "a national of the United States . . . shall lose his nationality by—
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> . . . . .
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> "(2) taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state or a political subdivision thereof."

There is no room in this provision to imply a requirement of a specific intent to relinquish citizenship. The Court does

not attempt to do so, nor does it explain how any other part of the statute supports its conclusion that Congress required proof of specific intent.[1]

I also disagree with the holding that a person may be deprived of his citizenship upon a showing by a mere preponderance of the evidence that he intended to relinquish it. The Court reasons that because the proceedings in question are civil in nature and do not result in any loss of physical liberty, no greater burden of proof is required than in the ordinary civil case. Such reasoning construes the constitutional concept of "liberty" too narrowly.

The House Report accompanying the 1961 amendment to the Immigration and Naturalization Act of 1952 refers to "the dignity and the priceless value of U. S. citizenship." H. R.

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[1] It could perhaps be argued that a specific intent requirement can be derived from 8 U. S. C. § 1481 (c). That subsection creates a rebuttable presumption that any expatriating act set forth in subsection (a) was performed "voluntarily." The term "voluntary" could conceivably be stretched to include the concept of a specific intent to renounce one's citizenship. While the person seeking to retain his citizenship would thus have the burden of showing a lack of specific intent, such a construction would at least provide a statutory basis for bringing the issue of intent into the proceeding. The majority apparently would not be willing to accept such a construction in order to salvage the statute, however, inasmuch as it rejects the appellant Secretary's argument that, if there is a requirement of specific intent, it is also subject to the presumption applicable to voluntariness. *Ante*, at 268.

The majority's assumption that the statute can be read to require specific intent to relinquish citizenship as an element of proof is also contradicted by the Court's treatment in *Afroyim* of a different subsection of the same statute. Like the subsection at issue here, subsection (a)(5) provided that an American automatically lost his nationality by performing a specific act: in that case, voting in a foreign election. If the majority's analysis in this case were correct, the Court in *Afroyim* should not have invalidated that provision of the statute; rather, it should merely have remanded for a finding as to whether Afroyim had voted in a foreign election with specific intent to relinquish his American citizenship. That the Court did not do so is strong evidence of its belief that the statute could not be reformed as it is today.

Rep. No. 1086, 87th Cong., 1st Sess., 41 (1961). That characterization is consistent with this Court's repeated appraisal of the quality of the interest at stake in this proceeding.[2] In my judgment a person's interest in retaining his American citizenship is surely an aspect of "liberty" of which he cannot be deprived without due process of law. Because the interest at stake is comparable to that involved in *Addington* v. *Texas*, 441 U. S. 418, essentially for the reasons stated in THE CHIEF JUSTICE's opinion for a unanimous Court in that case, see *id.*, at 425–427, 431–433, I believe that due process requires that a clear and convincing standard of proof be met in this case as well before the deprivation may occur.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART joins as to Part II, dissenting.

The Court holds that one may lose United States citizenship if the Government can prove by a preponderance of the evidence that certain acts, specified by statute, were done with the specific intent of giving up citizenship. Accordingly, the Court, in reversing the judgment of the Court of Appeals, holds that the District Court applied the correct evidentiary standards in determining that appellee was properly stripped of his citizenship. Because I would hold that one who acquires United States citizenship by virtue of being born in the United States, U. S. Const., Amdt. 14, § 1, can lose that citizenship only by formally renouncing it, and because I would hold that the act of which appellee is accused in this case cannot be an expatriating act, I dissent.

I

This case is governed by *Afroyim* v. *Rusk*, 387 U. S. 253

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[2] See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 160, where the Court quoted another report describing American citizenship as "'one of the most valuable rights in the world today.'" See also *Afroyim* v. *Rusk*, 387 U. S. 253, 267–268; *Trop* v. *Dulles*, 356 U. S. 86, 92.

(1967). *Afroyim*, emphasizing the crucial importance of the right of citizenship, held unequivocally that a citizen has "a constitutional right to remain a citizen . . . unless he voluntarily relinquishes that citizenship." *Id.*, at 268. "[T]he only way the citizenship . . . could be lost was by the voluntary renunciation or abandonment by the citizen himself." *Id.*, at 266. The Court held that because Congress could not "abridge," "affect," "restrict the effect of," or "take . . . away" citizenship, Congress was "without power to rob a citizen of his citizenship" because he voted in a foreign election. *Id.*, at 267.

The same clearly must be true of the Government's attempt to strip appellee of citizenship because he swore an oath of allegiance to Mexico.[1] Congress has provided for a procedure by which one may formally renounce citizenship.[2] In this case the appellant concedes that appellee has not renounced his citizenship under that procedure.[3] Brief for Appellant 56. Because one can lose citizenship only by voluntarily renouncing it and because appellee has not formally renounced his, I would hold that he remains a citizen. Accordingly, I would remand the case with orders that appellee be given a declaration of United States nationality.[4]

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[1] He was a Mexican citizen by virtue of his father's citizenship.

[2] Title 8 U. S. C. § 1481 (a)(6) provides that "a national of the United States whether by birth or naturalization, shall lose his nationality by . . .

. . . . . .

making a formal renunciation of nationality before a diplomatic or consular officer of the United States in a foreign state, in such form as may be prescribed by the Secretary of State." The Secretary of State has prescribed such procedures in 22 CFR § 50.50 (1979). See Department of State, 8 Foreign Affairs Manual § 225.6 (1972). Congress also provided for renunciation by citizens while in the United States in 8 U. S. C. § 1481 (a)(7). This last provision is not relevant to our case.

[3] Therefore, the appellant does not argue that appellee can be expatriated under 8 U. S. C. § 1481 (a)(6). See n. 2, *supra*.

[4] I would not reach the issues concerning 8 U. S. C. § 1481 (c).

II

I reach the same result by another, independent line of reasoning. Appellee was born a dual national. He is a citizen of the United States because he was born here and a citizen of Mexico because his father was Mexican. The only expatriating act of which appellee stands accused is having sworn an oath of allegiance to Mexico. If dual citizenship, *per se*, can be consistent with United States citizenship, *Perkins* v. *Elg*, 307 U. S. 325, 329 (1939),[5] then I cannot see why an oath of allegiance to the other country of which one is already a citizen should create inconsistency. One owes allegiance to any country of which one is a citizen, especially when one is living in that country. *Kawakita* v. *United States*, 343 U. S. 717, 733–735 (1952).[6] The formal oath adds nothing to the existing foreign citizenship and, therefore, cannot affect his United States citizenship.

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[5] *Rogers* v. *Bellei*, 401 U. S. 815 (1971), is not to the contrary. Bellei's citizenship was not based on the Fourteenth Amendment, *id.*, at 833, 835, and the issue before the Court was whether Bellei could lose his statutory citizenship for failure to satisfy a condition subsequent contained in the same statute that accorded him citizenship.

[6] Indeed, the opinion of the State Department once was "that a person with a dual citizenship who lives abroad in the other country claiming him as a national owes an allegiance to it which is paramount to the allegiance he owes the United States." *Kawakita* v. *United States*, 343 U. S., at 734–735.

MARTINEZ ET AL. *v.* CALIFORNIA ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

No. 78–1268. Argued November 5, 1979—Decided January 15, 1980

Appellants' decedent, a 15-year-old girl, was murdered by a parolee five months after he was released from prison despite his history as a sex offender. Appellants brought an action in a California court under state law and 42 U. S. C. § 1983, claiming that appellee state officials, by their action in releasing the parolee, subjected the decedent to a deprivation of her life without due process of law and were therefore liable in damages for the harm caused by the parolee. The trial court sustained a demurrer to the complaint. The California Court of Appeal affirmed, holding that a California statute granting public employees absolute immunity from liability for any injury resulting from parole-release determinations provided appellees with a complete defense to appellants' state-law claims, and that appellees enjoyed quasi-judicial immunity from liability under 42 U. S. C. § 1983.

Held:

1. The California immunity statute is not unconstitutional when applied to defeat a tort claim arising under state law. Pp. 280–283.

(a) The statute, which merely provides a defense to potential state tort-law liability, did not deprive appellants' decedent of her life without due process of law because it condoned a parole decision that led indirectly to her death. A legislative decision that has an incremental impact on the probability that death will result in any given situation cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander. P. 281.

(b) Even if the statute can be characterized as a deprivation of property, the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from wholly arbitrary or irrational state action. The statute is not irrational because the California Legislature could reasonably conclude that judicial review of parole decisions "would inevitably inhibit the exercise of discretion" and that this inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates

as well as security within prisons by holding out a promise of potential rewards. Pp. 281–283.

2. Appellants did not allege a claim for relief under federal law. Pp. 283–285.

(a) The Fourteenth Amendment protected appellants' decedent only from deprivation by the *State* of life without due process of law, and although the decision to release the parolee from prison was action by the State, the parolee's action five months later cannot be fairly characterized as state action. Pp. 284–285.

(b) Regardless of whether, as a matter of state tort law, the parole board either had a "duty" to avoid harm to the parolee's victim or proximately caused her death, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment. P. 285.

(c) Under the particular circumstances where the parolee was in no sense an agent of the parole board, and the board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger, appellants' decedent's death was too remote a consequence of appellees' action to hold them responsible under § 1983. P. 285.

85 Cal. App. 3d 430, 149 Cal. Rptr. 519, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Donald McGrath II argued the cause for appellants. With him on the brief was *Walter P. Christensen.*

Jeffrey T. Miller, Deputy Attorney General of California, argued the cause for appellees. With him on the brief were *George Deukmejian,* Attorney General, and *Robert L. Bergman,* Assistant Attorney General.*

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*Briefs of *amici curiae* urging reversal were filed by *Frank Carrington* for Americans for Effective Law Enforcement, Inc.; and by *Ronald A. Zumbrun* and *John H. Findley* for the Pacific Legal Foundation.

Briefs of *amici curiae* urging affirmance were filed by *Solicitor General McCree, Acting Assistant Attorney General Daniel, Robert E. Kopp,* and *Barbara L. Herwig* for the United States; by *John J. Degnan,* Attorney General, and *Erminie L. Conley,* Assistant Attorney General, for the State of New Jersey; and by *William J. Brown,* Attorney General, and *Simon B. Karas, George Stricker, Jr.,* and *Dennis L. Sipe,* Assistant Attorneys General, for the State of Ohio.

MR. JUSTICE STEVENS delivered the opinion of the Court.

The two federal questions that appellants ask us to decide are (1) whether the Fourteenth Amendment invalidates a California statute granting absolute immunity to public employees who make parole-release determinations, and (2) whether such officials are absolutely immune from liability in an action brought under the federal Civil Rights Act of 1871, 42 U. S. C. § 1983.[1] We agree with the California Court of Appeal that the state statute is valid when applied to claims arising under state law, and we conclude that appellants have not alleged a claim for relief under federal law.

The case arises out of the murder of a 15-year-old girl by a parolee. Her survivors brought this action in a California court claiming that the state officials responsible for the parole-release decision are liable in damages for the harm caused by the parolee.

The complaint alleged that the parolee, one Thomas, was convicted of attempted rape in December 1969. He was first committed to a state mental hospital as a "Mentally Disordered Sex Offender not amenable to treatment" and thereafter sentenced to a term of imprisonment of 1 to 20 years, with a recommendation that he not be paroled. Nevertheless, five years later, appellees decided to parole Thomas to the care of his mother. They were fully informed about his history, his propensities, and the likelihood that he would commit another violent crime. Moreover, in making their release determination they failed to observe certain "requisite formalities." Five months after his release Thomas tortured

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[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

and killed appellants' decedent. We assume, as the complaint alleges, that appellees knew, or should have known, that the release of Thomas created a clear and present danger that such an incident would occur. Their action is characterized not only as negligent, but also as reckless, willful, wanton and malicious.[2] Appellants prayed for actual and punitive damages of $2 million.

The trial judge sustained a demurrer to the complaint and his order was upheld on appeal. 85 Cal. App. 3d 430, 149 Cal. Rptr. 519 (1978). After the California Supreme Court denied appellants' petition for a hearing, we noted probable jurisdiction. 441 U. S. 960.

I

Section 845.8 (a) of the Cal. Gov't Code Ann. (West Supp. 1979) provides:

> "Neither a public entity nor a public employee is liable for:
>
> (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release."

The California courts held that this statute provided appellees with a complete defense to appellants' state-law claims.[3] They considered and rejected the contention that the immu-

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[2] Although the complaint refers to the failure to supervise Thomas after his release, a failure to warn females in the area of potential danger, and a failure to revoke the original parole decision, the litigation has focused entirely on the original decision. The individual appellees are not alleged to have responsibility for postrelease supervision of Thomas.

[3] The dismissal of appellants' cause of action charging negligent failure to warn females in the area of danger was predicated on appellants' concession that there was no "continuing relationship between the state and the victim," 85 Cal. App. 3d 430, 435, 149 Cal. Rptr. 519, 523 (1978), a requirement of state law.

nity statute as so construed violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.[4]

Like the California courts, we cannot accept the contention that this statute deprived Thomas' victim of her life without due process of law because it condoned a parole decision that led indirectly to her death. The statute neither authorized nor immunized the deliberate killing of any human being. It is not the equivalent of a death penalty statute which expressly authorizes state agents to take a person's life after prescribed procedures have been observed. This statute merely provides a defense to potential state tort-law liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might. But the basic risk that repeat offenses may occur is always present in any parole system. A legislative decision that has an incremental impact on the probability that death will result in any given situation—such as setting the speed limit at 55-miles-per-hour instead of 45—cannot be characterized as state action depriving a person of life just because it may set in motion a chain of events that ultimately leads to the random death of an innocent bystander.

Nor can the statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property"

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[4] ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., Amdt. 14, § 1.

Although the question presented in the jurisdictional statement posits an Equal Protection Clause challenge to the statute, that point was not actually briefed in this Court. It was also neither raised in nor treated by the courts below. We therefore make no further reference to that challenge.

protected by the Due Process Clause. On that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials.[5] But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.

We have no difficulty in accepting California's conclusion that there "is a rational relationship between the state's purposes and the statute." [6] In fashioning state policy in a "prac-

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[5] It is arguable, however, that the immunity defense, like an element of the tort claim itself, is merely one aspect of the State's definition of that property interest. Recently, in considering a lawyer's claim of immunity in a state malpractice action, we noted that

"when state law creates a cause of action, the State is free to define the defenses to that claim, including the defense of immunity, unless, of course, the state rule is in conflict with federal law." *Ferri* v. *Ackerman*, *ante*, at 198.

[6] "Martinez says the statute, Government Code section 845.8, subdivision (a), is unconstitutional because it permits the deprivation of life, a fundamental right, without due process. He suggests the statute, if it confers absolute immunity, encouraged the actions resulting in Mary Ellen's death and, thus, requires a compelling state interest. However, the Legislature has broad powers to control governmental tort liability limited only by the rule it not act arbitrarily (*Reed* v. *City & County of San Francisco*, 237 Cal. App. 2d 23, 24 . . .). The California Tort Claims Act as a whole (Gov. Code § 810 et seq.) has been found constitutional (*Datil* v. *City of Los Angeles*, 263 Cal. App. 2d 655, 660–661 . . .). The stated purpose of section 845.8, subdivision (a), is to allow correctional personnel to make determinations of release or parole unfettered by any fear of tort liability (Law Revision Com. com.). To impose tort liability would have a chilling effect on the decision-making process, impede implementation of trial release programs and prolong incarceration unjustifiably for many prisoners. There is a rational relationship between the state's purposes and the statute." 85 Cal. App. 3d, at 437, 149 Cal. Rptr., at 524.

The opinion of the California Court of Appeal does not expressly mention the Federal Constitution. But it is clear from appellants' response to

tical and troublesome area" like this, see *McGinnis* v. *Royster*, 410 U. S. 263, 270, the California Legislature could reasonably conclude that judicial review of a parole officer's decisions "would inevitably inhibit the exercise of discretion," *United States ex rel. Miller* v. *Twomey*, 479 F. 2d 701, 721 (CA7 1973), cert. denied, 414 U. S. 1146. That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law.

II

We turn then to appellants' § 1983 claim that appellees, by their action in releasing Thomas, subjected appellants' decedent to a deprivation of her life without due process of law.[7]

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the demurrer that they were relying on "a federally protected right to life under the Constitution of the United States." Record 59.

[7] We note that the California courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where

"'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.'" *Testa* v. *Katt*, 330 U. S. 386, 391, quoting *Claflin* v. *Houseman*, 93 U. S. 130, 137.

See also *Aldinger* v. *Howard*, 427 U. S. 1, 36, n. 17 (BRENNAN, J., dissenting); *Grubb* v. *Public Utilities Comm'n*, 281 U. S. 470, 476. We have never considered, however, the question whether a State *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts

It is clear that the California immunity statute does not control this claim even though the federal cause of action is being asserted in the state courts.[8] We also conclude that it is not necessary for us to decide any question concerning the immunity of state parole officials as a matter of federal law because, as we recently held in *Baker* v. *McCollan*, 443 U. S. 137, "[t]he first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws' " of the United States.[9] The answer to that inquiry disposes of this case.

Appellants contend that the decedent's right to life is protected by the Fourteenth Amendment to the Constitution. But the Fourteenth Amendment protected her only from deprivation by the "*State* . . . of life . . . without due process of law." Although the decision to release Thomas from prison

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are generally not free to refuse enforcement of the federal claim. *Testa* v. *Katt*, *supra*, at 394. But see *Chamberlain* v. *Brown*, 223 Tenn. 25, 442 S. W. 2d 248 (1969).

[8] "Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See *McLaughlin* v. *Tilendis*, 398 F. 2d 287, 290 (7th Cir. 1968). The immunity claim raises a question of federal law." *Hampton* v. *Chicago*, 484 F. 2d 602, 607 (CA7 1973), cert. denied, 415 U. S. 917.

[9] *Baker* v. *McCollan*, 443 U. S., at 140. Although there was a dissent in that case, the issue that divided the Court was, assuming the plaintiff had been deprived of constitutionally protected liberty, what process was due. There was no disagreement with the majority's methodology of isolating the particular constitutional infringement complained of. Since we decide here that the State did not "deprive" appellants' decedent of a constitutionally protected right, we need not reach the question whether a lack of "due process" was adequately alleged by the reference to a failure to observe "requisite formalities." It must be remembered that even if a state decision does deprive an individual of life or property, and even if that decision is erroneous, it does not necessarily follow that the decision violated that individual's right to due process.

was action by the State, the action of Thomas five months later cannot be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a "duty" to avoid harm to his victim or to have proximately caused her death, see *Grimm* v. *Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P. 2d 1227 (1977); *Palsgraf* v. *Long Island R. Co.*, 248 N. Y. 339, 162 N. E. 99 (1928), we hold that, taking these particular allegations as true, appellees did not "deprive" appellants' decedent of life within the meaning of the Fourteenth Amendment.

Her life was taken by the parolee five months after his release.[10] He was in no sense an agent of the parole board. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232. Further, the parole board was not aware that appellants' decedent, as distinguished from the public at large, faced any special danger. We need not and do not decide that a parole officer could never be deemed to "deprive" someone of life by action taken in connection with the release of a prisoner on parole.[11] But we do hold that at least under the particular circumstances of this parole decision, appellants' decedent's death is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law. Although a § 1983 claim has been described as "a species of tort liability," *Imbler* v. *Pachtman*, 424 U. S. 409, 417, it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute.

The judgment is affirmed.

So ordered.

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[10] Compare the facts in *Screws* v. *United States*, 325 U. S. 91, where local law enforcement officials themselves beat a citizen to death.

[11] We reserve the question of what immunity, if any, a state parole officer has in a § 1983 action where a constitutional violation is made out by the allegations.

WORLD-WIDE VOLKSWAGEN CORP. ET AL. *v.* WOODSON, DISTRICT JUDGE OF CREEK COUNTY, OKLAHOMA, ET AL.

CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

No. 78–1078. Argued October 3, 1979—Decided January 21, 1980

A products-liability action was instituted in an Oklahoma state court by respondents husband and wife to recover for personal injuries sustained in Oklahoma in an accident involving an automobile that had been purchased by them in New York while they were New York residents and that was being driven through Oklahoma at the time of the accident. The defendants included the automobile retailer and its wholesaler (petitioners), New York corporations that did no business in Oklahoma. Petitioners entered special appearances, claiming that Oklahoma's exercise of jurisdiction over them would offend limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court rejected petitioners' claims, and they then sought, but were denied, a writ of prohibition in the Oklahoma Supreme Court to restrain respondent trial judge from exercising *in personam* jurisdiction over them.

Held: Consistently with the Due Process Clause, the Oklahoma trial court may not exercise *in personam* jurisdiction over petitioners. Pp. 291–299.

(a) A state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co.* v. *Washington*, 326 U. S. 310. The defendant's contacts with the forum State must be such that maintenance of the suit does not offend traditional notions of fair play and substantial justice, *id.*, at 316, and the relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there," *id.*, at 317. The Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *Id.*, at 319. Pp. 291–294.

(b) Here, there is a total absence in the record of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma; they close no sales and perform no services there, avail

themselves of none of the benefits of Oklahoma law, and solicit no business there either through salespersons or through advertising reasonably calculated to reach that State. Nor does the record show that they regularly sell cars to Oklahoma residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. Although it is foreseeable that automobiles sold by petitioners would travel to Oklahoma and that the automobile here might cause injury in Oklahoma, "foreseeability" alone is not a sufficient benchmark for personal jurisdiction under the Due Process Clause. The foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State, but rather is that the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there. Nor can jurisdiction be supported on the theory that petitioners earn substantial revenue from goods used in Oklahoma. Pp. 295–299.

585 P. 2d 351, reversed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, *post*, p. 299. MARSHALL, J., filed a dissenting opinion, in which BLACKMUN, J., joined, *post*, p. 313. BLACKMUN, J., filed a dissenting opinion, *post*, p. 317.

Herbert Rubin argued the cause for petitioners. With him on the briefs were *Dan A. Rogers*, *Bernard J. Wald*, and *Ian Ceresney*.

Jefferson G. Greer argued the cause for respondents. With him on the brief was *Charles A. Whitebook*.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue before us is whether, consistently with the Due Process Clause of the Fourteenth Amendment, an Oklahoma court may exercise *in personam* jurisdiction over a nonresident automobile retailer and its wholesale distributor in a products-liability action, when the defendants' only connection with Oklahoma is the fact that an automobile sold in New York to New York residents became involved in an accident in Oklahoma.

I

Respondents Harry and Kay Robinson purchased a new Audi automobile from petitioner Seaway Volkswagen, Inc. (Seaway), in Massena, N. Y., in 1976. The following year the Robinson family, who resided in New York, left that State for a new home in Arizona. As they passed through the State of Oklahoma, another car struck their Audi in the rear, causing a fire which severely burned Kay Robinson and her two children.[1]

The Robinsons[2] subsequently brought a products-liability action in the District Court for Creek County, Okla., claiming that their injuries resulted from defective design and placement of the Audi's gas tank and fuel system. They joined as defendants the automobile's manufacturer, Audi NSU Auto Union Aktiengesellschaft (Audi); its importer, Volkswagen of America, Inc. (Volkswagen); its regional distributor, petitioner World-Wide Volkswagen Corp. (World-Wide); and its retail dealer, petitioner Seaway. Seaway and World-Wide entered special appearances,[3] claiming that Oklahoma's exercise of jurisdiction over them would offend the limitations on the State's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment.[4]

The facts presented to the District Court showed that World-Wide is incorporated and has its business office in New

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[1] The driver of the other automobile does not figure in the present litigation.

[2] Kay Robinson sued on her own behalf. The two children sued through Harry Robinson as their father and next friend.

[3] Volkswagen also entered a special appearance in the District Court, but unlike World-Wide and Seaway did not seek review in the Supreme Court of Oklahoma and is not a petitioner here. Both Volkswagen and Audi remain as defendants in the litigation pending before the District Court in Oklahoma.

[4] The papers filed by the petitioners also claimed that the District Court lacked "venue of the subject matter," App. 9, or "venue over the subject matter," *id.*, at 11.

York. It distributes vehicles, parts, and accessories, under contract with Volkswagen, to retail dealers in New York, New Jersey, and Connecticut. Seaway, one of these retail dealers, is incorporated and has its place of business in New York. Insofar as the record reveals, Seaway and World-Wide are fully independent corporations whose relations with each other and with Volkswagen and Audi are contractual only. Respondents adduced no evidence that either World-Wide or Seaway does any business in Oklahoma, ships or sells any products to or in that State, has an agent to receive process there, or purchases advertisements in any media calculated to reach Oklahoma. In fact, as respondents' counsel conceded at oral argument, Tr. of Oral Arg. 32, there was no showing that any automobile sold by World-Wide or Seaway has ever entered Oklahoma with the single exception of the vehicle involved in the present case.

Despite the apparent paucity of contacts between petitioners and Oklahoma, the District Court rejected their constitutional claim and reaffirmed that ruling in denying petitioners' motion for reconsideration.[5] Petitioners then sought a writ of prohibition in the Supreme Court of Oklahoma to restrain the District Judge, respondent Charles S. Woodson, from exercising *in personam* jurisdiction over them. They renewed their contention that, because they had no "minimal contacts," App. 32, with the State of Oklahoma, the actions of the District Judge were in violation of their rights under the Due Process Clause.

The Supreme Court of Oklahoma denied the writ, 585 P. 2d 351 (1978),[6] holding that personal jurisdiction over petitioners was authorized by Oklahoma's "long-arm" statute,

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[5] The District Court's rulings are unreported, and appear at App. 13 and 20.

[6] Five judges joined in the opinion. Two concurred in the result, without opinion, and one concurred in part and dissented in part, also without opinion.

Okla. Stat., Tit. 12, § 1701.03 (a)(4) (1971).[7] Although the court noted that the proper approach was to test jurisdiction against both statutory and constitutional standards, its analysis did not distinguish these questions, probably because § 1701.03 (a)(4) has been interpreted as conferring jurisdiction to the limits permitted by the United States Constitution.[8] The court's rationale was contained in the following paragraph, 585 P. 2d, at 354:

> "In the case before us, the product being sold and distributed by the petitioners is by its very design and purpose so mobile that petitioners can foresee its possible use in Oklahoma. This is especially true of the distributor, who has the exclusive right to distribute such automobile in New York, New Jersey and Connecticut. The evidence presented below demonstrated that goods sold and distributed by the petitioners were used in the State of Oklahoma, and under the facts we believe it reasonable to infer, given the retail value of the automobile, that the petitioners derive substantial income from automobiles which from time to time are used in the State of Oklahoma. This being the case, we hold that under the facts presented, the trial court was justified in con-

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[7] This subsection provides:

"A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state. . . ."

The State Supreme Court rejected jurisdiction based on § 1701.03 (a)(3), which authorizes jurisdiction over any person "causing tortious injury in this state by an act or omission in this state." Something in addition to the infliction of tortious injury was required.

[8] *Fields* v. *Volkswagen of America, Inc.*, 555 P. 2d 48 (Okla. 1976); *Carmack* v. *Chemical Bank New York Trust Co.*, 536 P. 2d 897 (Okla. 1975); *Hines* v. *Clendenning*, 465 P. 2d 460 (Okla. 1970).

cluding that the petitioners derive substantial revenue from goods used or consumed in this State."

We granted certiorari, 440 U. S. 907 (1979), to consider an important constitutional question with respect to state-court jurisdiction and to resolve a conflict between the Supreme Court of Oklahoma and the highest courts of at least four other States.[9] We reverse.

II

The Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant. *Kulko* v. *California Superior Court*, 436 U. S. 84, 91 (1978). A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. *Pennoyer* v. *Neff*, 95 U. S. 714, 732–733 (1878). Due process requires that the defendant be given adequate notice of the suit, *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313–314 (1950), and be subject to the personal jurisdiction of the court, *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945). In the present case, it is not contended that notice was inadequate; the only question is whether these particular petitioners were subject to the jurisdiction of the Oklahoma courts.

As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. *International Shoe Co.* v. *Washington*, *supra*, at 316. The concept of minimum contacts, in turn, can be seen to perform two related, but

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[9] Cf. *Tilley* v. *Keller Truck & Implement Corp.*, 200 Kan. 641, 438 P. 2d 128 (1968); *Granite States Volkswagen, Inc.* v. *District Court*, 177 Colo. 42, 492 P. 2d 624 (1972); *Pellegrini* v. *Sachs & Sons*, 522 P. 2d 704 (Utah 1974); *Oliver* v. *American Motors Corp.*, 70 Wash. 2d 875, 425 P. 2d 647 (1967).

distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington, supra,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940). The relationship between the defendant and the forum must be such that it is "reasonable . . . to require the corporation to defend the particular suit which is brought there." 326 U. S., at 317. Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State's interest in adjudicating the dispute, see *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 223 (1957); the plaintiff's interest in obtaining convenient and effective relief, see *Kulko* v. *California Superior Court, supra,* at 92, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, cf. *Shaffer* v. *Heitner,* 433 U. S. 186, 211, n. 37 (1977); the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies, see *Kulko* v. *California Superior Court, supra,* at 93, 98.

The limits imposed on state jurisdiction by the Due Process Clause, in its role as a guarantor against inconvenient litigation, have been substantially relaxed over the years. As we noted in *McGee* v. *International Life Ins. Co., supra,* at 222–

223, this trend is largely attributable to a fundamental transformation in the American economy:

> "Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity."

The historical developments noted in *McGee*, of course, have only accelerated in the generation since that case was decided.

Nevertheless, we have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution. The economic interdependence of the States was foreseen and desired by the Framers. In the Commerce Clause, they provided that the Nation was to be a common market, a "free trade unit" in which the States are debarred from acting as separable economic entities. *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525, 538 (1949). But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.

Hence, even while abandoning the shibboleth that "[t]he authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established," *Pennoyer* v. *Neff*, *supra*, at 720, we emphasized that the reasonableness of asserting jurisdiction over the defendant must be assessed "in the context of our federal system of govern-

ment," *International Shoe Co.* v. *Washington*, 326 U. S., at 317, and stressed that the Due Process Clause ensures not only fairness, but also the "orderly administration of the laws," *id.*, at 319. As we noted in *Hanson* v. *Denckla*, 357 U. S. 235, 250–251 (1958):

> "As technological progress has increased the flow of commerce between the States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over nonresidents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U. S. 714, to the flexible standard of *International Shoe Co.* v. *Washington*, 326 U. S. 310. But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation omitted.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States."

Thus, the Due Process Clause "does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington*, *supra*, at 319. Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment. *Hanson* v. *Denckla*, *supra*, at 251, 254.

III

Applying these principles to the case at hand,[10] we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.

It is argued, however, that because an automobile is mobile by its very design and purpose it was "foreseeable" that the Robinsons' Audi would cause injury in Oklahoma. Yet "foreseeability" alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. In *Hanson* v. *Denckla*, *supra*, it was no doubt foreseeable that the settlor of a Delaware trust would subsequently move to Florida and seek to exercise a power of appointment there; yet we held that Florida courts could not constitutionally

[10] Respondents argue, as a threshold matter, that petitioners waived any objections to personal jurisdiction by (1) joining with their special appearances a challenge to the District Court's subject-matter jurisdiction, see n. 4, *supra*, and (2) taking depositions on the merits of the case in Oklahoma. The trial court, however, characterized the appearances as "special," and the Oklahoma Supreme Court, rather than finding jurisdiction waived, reached and decided the statutory and constitutional questions. Cf. *Kulko* v. *California Superior Court*, 436 U. S. 84, 91, n. 5 (1978).

exercise jurisdiction over a Delaware trustee that had no other contacts with the forum State. In *Kulko* v. *California Superior Court*, 436 U. S. 84 (1978), it was surely "foreseeable" that a divorced wife would move to California from New York, the domicile of the marriage, and that a minor daughter would live with the mother. Yet we held that California could not exercise jurisdiction in a child-support action over the former husband who had remained in New York.

If foreseeability were the criterion, a local California tire retailer could be forced to defend in Pennsylvania when a blowout occurs there, see *Erlanger Mills, Inc.* v. *Cohoes Fibre Mills, Inc.*, 239 F. 2d 502, 507 (CA4 1956); a Wisconsin seller of a defective automobile jack could be haled before a distant court for damage caused in New Jersey, *Reilly* v. *Phil Tolkan Pontiac, Inc.*, 372 F. Supp. 1205 (NJ 1974); or a Florida soft-drink concessionaire could be summoned to Alaska to account for injuries happening there, see *Uppgren* v. *Executive Aviation Services, Inc.*, 304 F. Supp. 165, 170–171 (Minn. 1969). Every seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel. We recently abandoned the outworn rule of *Harris* v. *Balk*, 198 U. S. 215 (1905), that the interest of a creditor in a debt could be extinguished or otherwise affected by any State having transitory jurisdiction over the debtor. *Shaffer* v. *Heitner*, 433 U. S. 186 (1977). Having interred the mechanical rule that a creditor's amenability to a *quasi in rem* action travels with his debtor, we are unwilling to endorse an analogous principle in the present case.[11]

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[11] Respondents' counsel, at oral argument, see Tr. of Oral Arg. 19–22, 29, sought to limit the reach of the foreseeability standard by suggesting that there is something unique about automobiles. It is true that automobiles are uniquely mobile, see *Tyson* v. *Whitaker & Son, Inc.*, 407 A. 2d 1, 6, and n. 11 (Me. 1979) (McKusick, C. J.), that they did play a crucial role in the expansion of personal jurisdiction through the fiction of implied consent, *e. g.*, *Hess* v. *Pawloski*, 274 U. S. 352 (1927), and that

This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there. See *Kulko* v. *California Superior Court, supra,* at 97–98; *Shaffer* v. *Heitner,* 433 U. S., at 216; and see *id.,* at 217–219 (STEVENS, J., concurring in judgment). The Due Process Clause, by ensuring the "orderly administration of the laws," *International Shoe Co.* v. *Washington,* 326 U. S., at 319, gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

When a corporation "purposefully avails itself of the privilege of conducting activities within the forum State," *Hanson* v. *Denckla,* 357 U. S., at 253, it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. Hence if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not

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some of the cases have treated the automobile as a "dangerous instrumentality." But today, under the regime of *International Shoe,* we see no difference for jurisdictional purposes between an automobile and any other chattel. The "dangerous instrumentality" concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.

exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N. E. 2d 761 (1961).

But there is no such or similar basis for Oklahoma jurisdiction over World-Wide or Seaway in this case. Seaway's sales are made in Massena, N. Y. World-Wide's market, although substantially larger, is limited to dealers in New York, New Jersey, and Connecticut. There is no evidence of record that any automobiles distributed by World-Wide are sold to retail customers outside this tristate area. It is foreseeable that the purchasers of automobiles sold by World-Wide and Seaway may take them to Oklahoma. But the mere "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." *Hanson* v. *Denckla, supra,* at 253.

In a variant on the previous argument, it is contended that jurisdiction can be supported by the fact that petitioners earn substantial revenue from goods used in Oklahoma. The Oklahoma Supreme Court so found, 585 P. 2d, at 354–355, drawing the inference that because one automobile sold by petitioners had been used in Oklahoma, others might have been used there also. While this inference seems less than compelling on the facts of the instant case, we need not question the court's factual findings in order to reject its reasoning.

This argument seems to make the point that the purchase of automobiles in New York, from which the petitioners earn substantial revenue, would not occur *but for* the fact that the automobiles are capable of use in distant States like Oklahoma. Respondents observe that the very purpose of an automobile is to travel, and that travel of automobiles sold by petitioners is facilitated by an extensive chain of Volkswagen service centers throughout the country, including some in Okla-

homa.[12] However, financial benefits accruing to the defendant from a collateral relation to the forum State will not support jurisdiction if they do not stem from a constitutionally cognizable contact with that State. See *Kulko* v. *California Superior Court*, 436 U. S., at 94–95. In our view, whatever marginal revenues petitioners may receive by virtue of the fact that their products are capable of use in Oklahoma is far too attenuated a contact to justify that State's exercise of *in personam* jurisdiction over them.

Because we find that petitioners have no "contacts, ties, or relations" with the State of Oklahoma, *International Shoe Co.* v. *Washington*, *supra*, at 319, the judgment of the Supreme Court of Oklahoma is

Reversed.

MR. JUSTICE BRENNAN, dissenting.*

The Court holds that the Due Process Clause of the Fourteenth Amendment bars the States from asserting jurisdiction over the defendants in these two cases. In each case the Court so decides because it fails to find the "minimum contacts" that have been required since *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). Because I believe that the Court reads *International Shoe* and its progeny too narrowly, and because I believe that the standards enunciated by those cases may already be obsolete as constitutional boundaries, I dissent.

I

The Court's opinions focus tightly on the existence of contacts between the forum and the defendant. In so doing, they accord too little weight to the strength of the forum State's interest in the case and fail to explore whether there

[12] As we have noted, petitioners earn no direct revenues from these service centers. See *supra*, at 289.

*[This opinion applies also to No. 78–952, *Rush et al.* v. *Savchuk*, *post*, p. 320.]

would be any actual inconvenience to the defendant. The essential inquiry in locating the constitutional limits on state-court jurisdiction over absent defendants is whether the particular exercise of jurisdiction offends " 'traditional notions of fair play and substantial justice.' " *International Shoe, supra,* at 316, quoting *Milliken* v. *Meyer,* 311 U. S. 457, 463 (1940). The clear focus in *International Shoe* was on fairness and reasonableness. *Kulko* v. *California Superior Court,* 436 U. S. 84, 92 (1978). The Court specifically declined to establish a mechanical test based on the quantum of contacts between a State and the defendant:

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity *in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.* That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has *no* contacts, ties, or relations." 326 U. S., at 319 (emphasis added).

The existence of contacts, so long as there were some, was merely one way of giving content to the determination of fairness and reasonableness.

Surely *International Shoe* contemplated that the significance of the contacts necessary to support jurisdiction would diminish if some other consideration helped establish that jurisdiction would be fair and reasonable. The interests of the State and other parties in proceeding with the case in a particular forum are such considerations. *McGee* v. *International Life Ins. Co.,* 355 U. S. 220, 223 (1957), for instance, accorded great importance to a State's "manifest interest in providing effective means of redress" for its citizens. See also *Kulko* v. *California Superior Court, supra,* at 92; *Shaffer* v. *Heitner,* 433 U. S. 186, 208 (1977); *Mullane* v. *Central Hanover Trust Co.,* 339 U. S. 306, 313 (1950).

Another consideration is the actual burden a defendant

must bear in defending the suit in the forum. *McGee, supra.* Because lesser burdens reduce the unfairness to the defendant, jurisdiction may be justified despite less significant contacts. The burden, of course, must be of constitutional dimension. Due process limits on jurisdiction do not protect a defendant from all inconvenience of travel, *McGee, supra,* at 224, and it would not be sensible to make the constitutional rule turn solely on the number of miles the defendant must travel to the courtroom.[1] Instead, the constitutionally significant "burden" to be analyzed relates to the mobility of the defendant's defense. For instance, if having to travel to a foreign forum would hamper the defense because witnesses or evidence or the defendant himself were immobile, or if there were a disproportionately large number of witnesses or amount of evidence that would have to be transported at the defendant's expense, or if being away from home for the duration of the trial would work some special hardship on the defendant, then the Constitution would require special consideration for the defendant's interests.

That considerations other than contacts between the forum and the defendant are relevant necessarily means that the Constitution does not require that trial be held in the State which has the "best contacts" with the defendant. See *Shaffer* v. *Heitner, supra,* at 228 (BRENNAN, J., dissenting). The defendant has no constitutional entitlement to the best forum or, for that matter, to any particular forum. Under even the most restrictive view of *International Shoe,* several States could have jurisdiction over a particular cause of action. We need only determine whether the forum States in these cases satisfy the constitutional minimum.[2]

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[1] In fact, a courtroom just across the state line from a defendant may often be far more convenient for the defendant than a courtroom in a distant corner of his own State.

[2] The States themselves, of course, remain free to choose whether to extend their jurisdiction to embrace all defendants over whom the Constitution would permit exercise of jurisdiction.

II

In each of these cases, I would find that the forum State has an interest in permitting the litigation to go forward, the litigation is connected to the forum, the defendant is linked to the forum, and the burden of defending is not unreasonable. Accordingly, I would hold that it is neither unfair nor unreasonable to require these defendants to defend in the forum State.

A

In No. 78–952, a number of considerations suggest that Minnesota is an interested and convenient forum. The action was filed by a bona fide resident of the forum.[3] Consequently, Minnesota's interests are similar to, even if lesser than, the interests of California in *McGee, supra*, "in providing a forum for its residents and in regulating the activities of insurance companies" doing business in the State.[4] *Post*, at 332. Moreover, Minnesota has "attempted to assert [its] particularized interest in trying such cases in its courts by . . . enacting a special jurisdictional statute." *Kulko, supra*, at 98; *McGee, supra*, at 221, 224. As in *McGee*, a resident forced to travel to a distant State to prosecute an action

[3] The plaintiff asserted jurisdiction pursuant to Minn. Stat. § 571.41, subd. 2 (1978), which allows garnishment of an insurer's obligation to defend and indemnify its insured. See *post*, at 322–323, n. 3, and accompanying text. The Minnesota Supreme Court has interpreted the statute as allowing suit only to the insurance policy's liability limit. The court has held that the statute embodies the rule of *Seider* v. *Roth*, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966).

[4] To say that these considerations are relevant is a far cry from saying that they are "substituted for . . . contacts with the defendant and the cause of action." *Post*, at 332. The forum's interest in the litigation is an independent point of inquiry even under traditional readings of *International Shoe*'s progeny. If there is a shift in focus, it is not away from "the relationship *among* the defendant, the forum, and the litigation." *Post*, at 332 (emphasis added). Instead it is a shift within the same accepted relationship from the connections *between* the defendant and the forum to those between the forum and the litigation.

against someone who has injured him could, for lack of funds, be entirely unable to bring the cause of action. The plaintiff's residence in the State makes the State one of a very few convenient fora for a personal injury case (the others usually being the defendant's home State and the State where the accident occurred).[5]

In addition, the burden on the defendant is slight. As Judge Friendly has recognized, *Shaffer* emphasizes the importance of identifying the real impact of the lawsuit. *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194, 200 (CA2 1978) (upholding the constitutionality of jurisdiction in a very similar case under New York's law after *Shaffer*). Here the real impact is on the defendant's insurer, which is concededly amenable to suit in the forum State. The defendant is carefully protected from financial liability because the action limits the prayer for damages to the insurance policy's liability limit.[6] The insurer will handle the case for the defendant. The defendant is only a nominal party who need be no more active in the case than the cooperation clause of his policy requires. Because of the ease of airline transportation, he need not lose significantly more time than if the case were at home. Consequently, if the suit went for-

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[5] In every *International Shoe* inquiry, the defendant, necessarily, is outside the forum State. Thus it is inevitable that either the defendant or the plaintiff will be inconvenienced. The problem existing at the time of *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), that a resident plaintiff could obtain a binding judgment against an unsuspecting, distant defendant, has virtually disappeared in this age of instant communication and virtually instant travel.

[6] It is true that the insurance contract is not the subject of the litigation. *Post*, at 329. But one of the undisputed clauses of the insurance policy is that the insurer will defend this action and pay any damages assessed, up to the policy limit. The very purpose of the contract is to relieve the insured from having to defend himself, and under the state statute there could be no suit absent the insurance contract. Thus, in a real sense, the insurance contract is the source of the suit. See *Shaffer* v. *Heitner*, 433 U. S. 186, 207 (1977).

ward in Minnesota, the defendant would bear almost no burden or expense beyond what he would face if the suit were in his home State. The real impact on the named defendant is the same as it is in a direct action against the insurer, which would be constitutionally permissible. *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954); *Minichiello* v. *Rosenberg*, 410 F. 2d 106, 109–110 (CA2 1968). The only distinction is the formal, "analytica[l] prerequisite," *post*, at 331, of making the insured a named party. Surely the mere addition of appellant's name to the complaint does not suffice to create a due process violation.[7]

Finally, even were the relevant inquiry whether there are sufficient contacts between the forum and the named defendant, I would find that such contacts exist. The insurer's presence in Minnesota is an advantage to the defendant that may well have been a consideration in his selecting the policy he did. An insurer with offices in many States makes it easier for the insured to make claims or conduct other business that may become necessary while traveling. It is simply not true that "State Farm's decision to do business in Minnesota was completely adventitious as far as Rush was concerned." *Post*, at 328–329. By buying a State Farm policy, the defendant availed himself of the benefits he might derive from having an insurance agent in Minnesota who could, among other things, facilitate a suit for appellant against a Minnesota resident. It seems unreasonable to read the Constitution as permitting one to take advantage of his nationwide insurance network but not to be burdened by it.

In sum, I would hold that appellant is not deprived of due process by being required to submit to trial in Minnesota, first because Minnesota has a sufficient interest in and con-

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[7] Were the defendant a real party subject to actual liability or were there significant noneconomic consequences such as those suggested by the Court's note 20, *post*, at 331, a more substantial connection with the forum State might well be constitutionally required.

nection to this litigation and to the real and nominal defendants, and second because the burden on the nominal defendant is sufficiently slight.

B

In No. 78–1078, the interest of the forum State and its connection to the litigation is strong. The automobile accident underlying the litigation occurred in Oklahoma. The plaintiffs were hospitalized in Oklahoma when they brought suit. Essential witnesses and evidence were in Oklahoma. See *Shaffer* v. *Heitner*, 433 U. S., at 208. The State has a legitimate interest in enforcing its laws designed to keep its highway system safe, and the trial can proceed at least as efficiently in Oklahoma as anywhere else.

The petitioners are not unconnected with the forum. Although both sell automobiles within limited sales territories, each sold the automobile which in fact was driven to Oklahoma where it was involved in an accident.[8] It may be true, as the Court suggests, that each sincerely intended to limit its commercial impact to the limited territory, and that each intended to accept the benefits and protection of the laws only of those States within the territory. But obviously these were unrealistic hopes that cannot be treated as an automatic constitutional shield.[9]

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[8] On the basis of this fact the state court inferred that the petitioners derived substantial revenue from goods used in Oklahoma. The inference is not without support. Certainly, were use of goods accepted as a relevant contact, a plaintiff would not need to have an exact count of the number of petitioners' cars that are used in Oklahoma.

[9] Moreover, imposing liability in this case would not so undermine certainty as to destroy an automobile dealer's ability to do business. According jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State. In addition, these petitioners are represented by insurance companies. They not only could, but did, purchase insurance to protect them should they stand trial and lose the case. The costs of the insurance no doubt are passed on to customers.

An automobile simply is not a stationary item or one designed to be used in one place. An automobile is *intended* to be moved around. Someone in the business of selling large numbers of automobiles can hardly plead ignorance of their mobility or pretend that the automobiles stay put after they are sold. It is not merely that a dealer in automobiles foresees that they will move. *Ante*, at 295. The dealer actually intends that the purchasers will use the automobiles to travel to distant States where the dealer does not directly "do business." The sale of an automobile does *purposefully* inject the vehicle into the stream of interstate commerce so that it can travel to distant States. See *Kulko*, 436 U. S., at 94; *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958).

This case is similar to *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U. S. 493 (1971). There we indicated, in the course of denying leave to file an original-jurisdiction case, that corporations having no direct contact with Ohio could constitutionally be brought to trial in Ohio because they dumped pollutants into streams outside Ohio's limits which ultimately, through the action of the water, reached Lake Erie and affected Ohio. No corporate acts, only their consequences, occurred in Ohio. The stream of commerce is just as natural a force as a stream of water, and it was equally predictable that the cars petitioners released would reach distant States.[10]

The Court accepts that a State may exercise jurisdiction over a distributor which "serves" that State "indirectly" by "deliver[ing] its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Ante*, at 297–298. It is difficult to see why the Constitution should distinguish between a case involving

[10] One might argue that it was more predictable that the pollutants would reach Ohio than that one of petitioners' cars would reach Oklahoma. The Court's analysis, however, excludes jurisdiction in a contiguous State such as Pennsylvania as surely as in more distant States such as Oklahoma.

goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer, using them as the dealer knew the customer would, took them there.[11] In each case the seller purposefully injects the goods into the stream of commerce and those goods predictably are used in the forum State.[12]

Furthermore, an automobile seller derives substantial benefits from States other than its own. A large part of the value of automobiles is the extensive, nationwide network of highways. Significant portions of that network have been constructed by and are maintained by the individual States, including Oklahoma. The States, through their highway programs, contribute in a very direct and important way to the value of petitioners' businesses. Additionally, a network of other related dealerships with their service departments operates throughout the country under the protection of the laws of the various States, including Oklahoma, and enhances the value of petitioners' businesses by facilitating their customers' traveling.

Thus, the Court errs in its conclusion, *ante,* at 299 (emphasis added), that "petitioners have *no* 'contacts, ties, or relations' " with Oklahoma. There obviously are contacts, and, given Oklahoma's connection to the litigation, the contacts are sufficiently significant to make it fair and reasonable for the petitioners to submit to Oklahoma's jurisdiction.

III

It may be that affirmance of the judgments in these cases would approach the outer limits of *International Shoe*'s juris-

[11] For example, I cannot understand the constitutional distinction between selling an item in New Jersey and selling an item in New York expecting it to be used in New Jersey.

[12] The manufacturer in the case cited by the Court, *Gray* v. *American Radiator & Standard Sanitary Corp.,* 22 Ill. 2d 432, 176 N. E. 2d 761 (1961), had no more control over which States its goods would reach than did the petitioners in this case.

dictional principle. But that principle, with its almost exclusive focus on the rights of defendants, may be outdated. As MR. JUSTICE MARSHALL wrote in *Shaffer* v. *Heitner*, 433 U. S., at 212: " '[T]raditional notions of fair play and substantial justice' can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures. . . ."

International Shoe inherited its defendant focus from *Pennoyer* v. *Neff*, 95 U. S. 714 (1878), and represented the last major step this Court has taken in the long process of liberalizing the doctrine of personal jurisdiction. Though its flexible approach represented a major advance, the structure of our society has changed in many significant ways since *International Shoe* was decided in 1945. Mr. Justice Black, writing for the Court in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220, 222 (1957), recognized that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." He explained the trend as follows:

> "In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.*, at 222–223.

As the Court acknowledges, *ante*, at 292–293, both the nationalization of commerce and the ease of transportation and communication have accelerated in the generation since 1957.[13]

[13] Statistics help illustrate the amazing expansion in mobility since *International Shoe*. The number of revenue passenger-miles flown on

The model of society on which the *International Shoe* Court based its opinion is no longer accurate. Business people, no matter how local their businesses, cannot assume that goods remain in the business' locality. Customers and goods can be anywhere else in the country usually in a matter of hours and always in a matter of a very few days.

In answering the question whether or not it is fair and reasonable to allow a particular forum to hold a trial binding on a particular defendant, the interests of the forum State and other parties loom large in today's world and surely are entitled to as much weight as are the interests of the defendant. The "orderly administration of the laws" provides a firm basis for according some protection to the interests of plaintiffs and States as well as of defendants.[14] Certainly, I cannot see how a defendant's right to due process is violated if the defendant suffers no inconvenience. See *ante*, at 294.

The conclusion I draw is that constitutional concepts of fairness no longer require the extreme concern for defendants that was once necessary. Rather, as I wrote in dissent from *Shaffer* v. *Heitner*, *supra*, at 220 (emphasis added), minimum

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domestic and international flights increased by nearly three orders of magnitude between 1945 (450 million) and 1976 (179 billion). U. S. Department of Commerce, Historical Statistics of the United States, pt. 2, p. 770 (1975); U. S. Department of Commerce, Statistical Abstract of the United States 670 (1978). Automobile vehicle-miles (including passenger cars, buses, and trucks) driven in the United States increased by a relatively modest 500% during the same period, growing from 250 billion in 1945 to 1,409 billion in 1976. Historical Statistics, *supra*, at 718; Statistical Abstract, *supra*, at 647.

[14] The Court has recognized that there are cases where the interests of justice can turn the focus of the jurisdictional inquiry away from the contacts between a defendant and the forum State. For instance, the Court indicated that the requirement of contacts may be greatly relaxed (if indeed any personal contacts would be required) where a plaintiff is suing a nonresident defendant to enforce a judgment procured in another State. *Shaffer* v. *Heitner*, 433 U. S., at 210–211, nn. 36, 37.

contacts must exist "among the *parties*, the contested transaction, and the forum State." [15] The contacts between any two of these should not be determinative. "[W]hen a suitor seeks to lodge a suit in a State with a substantial interest in seeing its own law applied to the transaction in question, we could wisely act to minimize conflicts, confusion, and uncertainty by adopting a liberal view of jurisdiction, unless considerations of fairness or efficiency strongly point in the opposite direction." [16] 433 U. S., at 225–226. Mr. Justice Black, dissenting in *Hanson* v. *Denckla*, 357 U. S., at 258–259, expressed similar concerns by suggesting that a State should have jurisdiction over a case growing out of a transaction significantly related to that State "unless litigation there would impose such a heavy and disproportionate burden on a nonresident defendant that it would offend what this Court has referred to as 'traditional notions of fair play and substantial justice.'" [17] Assuming

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[15] In some cases, the inquiry will resemble the inquiry commonly undertaken in determining which State's law to apply. That it is fair to apply a State's law to a nonresident defendant is clearly relevant in determining whether it is fair to subject the defendant to jurisdiction in that State. *Shaffer* v. *Heitner*, *supra*, at 225 (BRENNAN, J., dissenting); *Hanson* v. *Denckla*, 357 U. S. 235, 258 (1958) (Black, J., dissenting). See n. 19, *infra*.

[16] Such a standard need be no more uncertain than the Court's test "in which few answers will be written 'in black and white. The greys are dominant and even among them the shades are innumerable.' *Estin* v. *Estin*, 334 U. S. 541, 545 (1948)." *Kulko* v. *California Superior Court*, 436 U. S. 84, 92 (1978).

[17] This strong emphasis on the State's interest is nothing new. This Court, permitting the forum to exercise jurisdiction over nonresident claimants to a trust largely on the basis of the forum's interest in closing the trust, stated:

"[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear

that a State gives a nonresident defendant adequate notice and opportunity to defend, I do not think the Due Process Clause is offended merely because the defendant has to board a plane to get to the site of the trial.

The Court's opinion in No. 78–1078 suggests that the defendant ought to be subject to a State's jurisdiction only if he has contacts with the State "such that he should reasonably anticipate being haled into court there." [18] *Ante*, at 297. There is nothing unreasonable or unfair, however, about recognizing commercial reality. Given the tremendous mobility of goods and people, and the inability of businessmen to control where goods are taken by customers (or retailers), I do not think that the defendant should be in complete control of the geographical stretch of his amenability to suit. Jurisdiction is no longer premised on the notion that nonresident defendants have somehow impliedly consented to suit. People should understand that they are held responsible for the consequences of their actions and that in our society most actions have consequences affecting many States. When an action in fact causes injury in another State, the actor should be prepared to aswer for it there unless defending in that State would be unfair for some reason other than that a state boundary must be crossed.[19]

In effect the Court is allowing defendants to assert the sov-

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and be heard." *Mullane* v. *Central Hanover Trust Co.*, 339 U. S. 306, 313 (1950).

[18] The Court suggests that this is the critical foreseeability rather than the likelihood that the product will go to the forum State. But the reasoning begs the question. A defendant cannot know if his actions will subject him to jurisdiction in another State until we have declared what the law of jurisdiction is.

[19] One consideration that might create some unfairness would be if the choice of forum also imposed on the defendant an unfavorable substantive law which the defendant could justly have assumed would not apply. See n. 15, *supra*.

ereign rights of their home States. The expressed fear is that otherwise all limits on personal jurisdiction would disappear. But the argument's premise is wrong. I would not abolish limits on jurisdiction or strip state boundaries of all significance, see *Hanson, supra*, at 260 (Black, J., dissenting); I would still require the plaintiff to demonstrate sufficient contacts among the parties, the forum, and the litigation to make the forum a reasonable State in which to hold the trial.[20]

I would also, however, strip the defendant of an unjustified veto power over certain very appropriate fora—a power the defendant justifiably enjoyed long ago when communication and travel over long distances were slow and unpredictable and when notions of state sovereignty were impractical and exaggerated. But I repeat that that is not today's world. If a plaintiff can show that his chosen forum State has a sufficient interest in the litigation (or sufficient contacts with the defendant), then the defendant who cannot show some real injury to a constitutionally protected interest, see *O'Connor* v. *Lee-Hy Paving Corp.*, 579 F. 2d, at 201, should have no constitutional excuse not to appear.[21]

The plaintiffs in each of these cases brought suit in a forum with which they had significant contacts and which had significant contacts with the litigation. I am not convinced that the defendants would suffer any "heavy and disproportionate burden" in defending the suits. Accordingly, I would hold

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[20] For instance, in No. 78–952, if the plaintiff were not a bona fide resident of Minnesota when the suit was filed or if the defendant were subject to financial liability, I might well reach a different result. In No. 78–1078, I might reach a different result if the accident had not occurred in Oklahoma.

[21] Frequently, of course, the defendant will be able to influence the choice of forum through traditional doctrines, such as venue or *forum non conveniens*, permitting the transfer of litigation. *Shaffer* v. *Heitner*, 433 U. S., at 228, n. 8 (BRENNAN, J., dissenting).

that the Constitution should not shield the defendants from appearing and defending in the plaintiffs' chosen fora.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BLACKMUN joins, dissenting.

For over 30 years the standard by which to measure the constitutionally permissible reach of state-court jurisdiction has been well established:

> "[D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken* v. *Meyer*, 311 U. S. 457, 463 (1940).

The corollary, that the Due Process Clause forbids the assertion of jurisdiction over a defendant "with which the state has no contacts, ties, or relations," 326 U. S., at 319, is equally clear. The concepts of fairness and substantial justice as applied to an evaluation of "the quality and nature of the [defendant's] activity," *ibid.*, are not readily susceptible of further definition, however, and it is not surprising that the constitutional standard is easier to state than to apply.

This is a difficult case, and reasonable minds may differ as to whether respondents have alleged a sufficient "relationship among the defendant[s], the forum, and the litigation," *Shaffer* v. *Heitner*, 433 U. S. 186, 204 (1977), to satisfy the requirements of *International Shoe*. I am concerned, however, that the majority has reached its result by taking an unnecessarily narrow view of petitioners' forum-related conduct. The majority asserts that "respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom: the fortuitous circumstance that a single Audi automobile, sold in New York to New York

residents, happened to suffer an accident while passing through Oklahoma." *Ante*, at 295. If that were the case, I would readily agree that the minimum contacts necessary to sustain jurisdiction are not present. But the basis for the assertion of jurisdiction is not the happenstance that an individual over whom petitioners had no control made a unilateral decision to take a chattel with him to a distant State. Rather, jurisdiction is premised on the deliberate and purposeful actions of the defendants themselves in choosing to become part of a nationwide, indeed a global, network for marketing and servicing automobiles.

Petitioners are sellers of a product whose utility derives from its mobility. The unique importance of the automobile in today's society, which is discussed in MR. JUSTICE BLACKMUN's dissenting opinion, *post*, at 318, needs no further elaboration. Petitioners know that their customers buy cars not only to make short trips, but also to travel long distances. In fact, the nationwide service network with which they are affiliated was designed to facilitate and encourage such travel. Seaway would be unlikely to sell many cars if authorized service were available only in Massena, N. Y. Moreover, local dealers normally derive a substantial portion of their revenues from their service operations and thereby obtain a further economic benefit from the opportunity to service cars which were sold in other States. It is apparent that petitioners have not attempted to minimize the chance that their activities will have effects in other States; on the contrary, they have chosen to do business in a way that increases that chance, because it is to their economic advantage to do so.

To be sure, petitioners could not know in advance that this particular automobile would be driven to Oklahoma. They must have anticipated, however, that a substantial portion of the cars they sold would travel out of New York. Seaway, a local dealer in the second most populous State, and World-

Wide, one of only seven regional Audi distributors in the entire country, see Brief for Respondents 2, would scarcely have been surprised to learn that a car sold by them had been driven in Oklahoma on Interstate 44, a heavily traveled transcontinental highway. In the case of the distributor, in particular, the probability that some of the cars it sells will be driven in every one of the contiguous States must amount to a virtual certainty. This knowledge should alert a reasonable businessman to the likelihood that a defect in the product might manifest itself in the forum State—not because of some unpredictable, aberrant, unilateral action by a single buyer, but in the normal course of the operation of the vehicles for their intended purpose.

It is misleading for the majority to characterize the argument in favor of jurisdiction as one of " 'foreseeability' alone." *Ante,* at 295. As economic entities petitioners reach out from New York, knowingly causing effects in other States and receiving economic advantage both from the ability to cause such effects themselves and from the activities of dealers and distributors in other States. While they did not receive revenue from making direct sales in Oklahoma, they intentionally became part of an interstate economic network, which included dealerships in Oklahoma, for pecuniary gain. In light of this purposeful conduct I do not believe it can be said that petitioners "had no reason to expect to be haled before a[n Oklahoma] court." *Shaffer* v. *Heitner, supra,* at 216; see *ante,* at 297, and *Kulko* v. *California Superior Court,* 436 U. S. 84, 97–98 (1978).

The majority apparently acknowledges that if a product is purchased in the forum State by a consumer, that State may assert jurisdiction over everyone in the chain of distribution. See *ante,* at 297–298. With this I agree. But I cannot agree that jurisdiction is necessarily lacking if the product enters the State not through the channels of distribution but in the course of its intended use by the consumer. We have recog-

nized the role played by the automobile in the expansion of our notions of personal jurisdiction. See *Shaffer* v. *Heitner*, *supra*, at 204; *Hess* v. *Pawloski*, 274 U. S. 352 (1927). Unlike most other chattels, which may find their way into States far from where they were purchased because their owner takes them there, the intended use of the automobile is precisely as a means of traveling from one place to another. In such a case, it is highly artificial to restrict the concept of the "stream of commerce" to the chain of distribution from the manufacturer to the ultimate consumer.

I sympathize with the majority's concern that persons ought to be able to structure their conduct so as not to be subject to suit in distant forums. But that may not always be possible. Some activities by their very nature may foreclose the option of conducting them in such a way as to avoid subjecting oneself to jurisdiction in multiple forums. This is by no means to say that all sellers of automobiles should be subject to suit everywhere; but a distributor of automobiles to a multistate market and a local automobile dealer who makes himself part of a nationwide network of dealerships can fairly expect that the cars they sell may cause injury in distant States and that they may be called on to defend a resulting lawsuit there.

In light of the quality and nature of petitioners' activity, the majority's reliance on *Kulko* v. *California Superior Court*, *supra*, is misplaced. *Kulko* involved the assertion of state-court jurisdiction over a nonresident individual in connection with an action to modify his child custody rights and support obligations. His only contact with the forum State was that he gave his minor child permission to live there with her mother. In holding that the exercise of jurisdiction violated the Due Process Clause, we emphasized that the cause of action as well as the defendant's actions in relation to the forum State arose *"not from the defendant's commercial transactions in interstate commerce,* but rather from his personal,

domestic relations," 436 U. S., at 97 (emphasis supplied), contrasting Kulko's actions with those of the insurance company in *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957), which were undertaken for commercial benefit.*

Manifestly, the "quality and nature" of commercial activity is different, for purposes of the *International Shoe* test, from actions from which a defendant obtains no economic advantage. Commercial activity is more likely to cause effects in a larger sphere, and the actor derives an economic benefit from the activity that makes it fair to require him to answer for his conduct where its effects are felt. The profits may be used to pay the costs of suit, and knowing that the activity is likely to have effects in other States the defendant can readily insure against the costs of those effects, thereby sparing himself much of the inconvenience of defending in a distant forum.

Of course, the Constitution forbids the exercise of jurisdiction if the defendant had no judicially cognizable contacts with the forum. But as the majority acknowledges, if such contacts are present the jurisdictional inquiry requires a balancing of various interests and policies. See *ante*, at 292; *Rush* v. *Savchuk*, *post*, at 332. I believe such contacts are to be found here and that, considering all of the interests and policies at stake, requiring petitioners to defend this action in Oklahoma is not beyond the bounds of the Constitution. Accordingly, I dissent.

MR. JUSTICE BLACKMUN, dissenting.

I confess that I am somewhat puzzled why the plaintiffs in this litigation are so insistent that the regional distributor and the retail dealer, the petitioners here, who handled the ill-fated Audi automobile involved in this litigation, be named defendants. It would appear that the manufacturer and the

*Similarly, I believe the Court in *Hanson* v. *Denckla*, 357 U. S. 235 (1958), was influenced by the fact that trust administration has traditionally been considered a peculiarly local activity.

importer, whose subjectability to Oklahoma jurisdiction is not challenged before this Court, ought not to be judgment-proof. It may, of course, ultimately amount to a contest between insurance companies that, once begun, is not easily brought to a termination. Having made this much of an observation, I pursue it no further.

For me, a critical factor in the disposition of the litigation is the nature of the instrumentality under consideration. It has been said that we are a nation on wheels. What we are concerned with here is the automobile and its peripatetic character. One need only examine our national network of interstate highways, or make an appearance on one of them, or observe the variety of license plates present not only on those highways but in any metropolitan area, to realize that any automobile is likely to wander far from its place of licensure or from its place of distribution and retail sale. Miles per gallon on the highway (as well as in the city) and mileage per tankful are familiar allegations in manufacturers' advertisements today. To expect that any new automobile will remain in the vicinity of its retail sale—like the 1914 electric car driven by the proverbial "little old lady"—is to blink at reality. The automobile is intended for distance as well as for transportation within a limited area.

It therefore seems to me not unreasonable—and certainly not unconstitutional and beyond the reach of the principles laid down in *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and its progeny—to uphold Oklahoma jurisdiction over this New York distributor and this New York dealer when the accident happened in Oklahoma. I see nothing more unfair for them than for the manufacturer and the importer. All are in the business of providing vehicles that spread out over the highways of our several States. It is not too much to anticipate at the time of distribution and at the time of retail sale that this Audi would be in Oklahoma. Moreover, in assessing "minimum contacts," foreseeable use in another State seems to me to be little different from foreseeable resale

in another State. Yet the Court declares this distinction determinative. *Ante,* at 297–299.

MR. JUSTICE BRENNAN points out in his dissent, *ante,* at 307, that an automobile dealer derives substantial benefits from States other than its own. The same is true of the regional distributor. Oklahoma does its best to provide safe roads. Its police investigate accidents. It regulates driving within the State. It provides aid to the victim and thereby, it is hoped, lessens damages. Accident reports are prepared and made available. All this contributes to and enhances the business of those engaged professionally in the distribution and sale of automobiles. All this also may benefit defendants in the very lawsuits over which the State asserts jurisdiction.

My position need not now take me beyond the automobile and the professional who does business by way of distributing and retailing automobiles. Cases concerning other instrumentalities will be dealt with as they arise and in their own contexts.

I would affirm the judgment of the Supreme Court of Oklahoma. Because the Court reverses that judgment, it will now be about parsing every variant in the myriad of motor vehicle fact situations that present themselves. Some will justify jurisdiction and others will not. All will depend on the "contact" that the Court sees fit to perceive in the individual case.

RUSH ET AL. *v.* SAVCHUK

APPEAL FROM THE SUPREME COURT OF MINNESOTA

No. 78-952. Argued October 3, 1979—Decided January 21, 1980

While a resident of Indiana, appellee was injured in an accident in Indiana while riding as a passenger in a car driven by appellant Rush, also an Indiana resident. After moving to Minnesota, appellee commenced this action against Rush in a Minnesota state court, alleging negligence and seeking damages. As Rush had no contacts with Minnesota that would support *in personam* jurisdiction, appellee attempted to obtain *quasi in rem* jurisdiction by garnishing the contractual obligation of State Farm Mutual Automobile Insurance Co. (State Farm) to defend and indemnify Rush in connection with such a suit. State Farm, which does business in Minnesota, had insured the car, owned by Rush's father, under a liability insurance policy issued in Indiana. Rush was personally served in Indiana, and after State Farm's response to the garnishment summons asserted that it owed the defendant nothing, appellee moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action. Rush and State Farm moved to dismiss the complaint for lack of jurisdiction over the defendant. The trial court denied the motion to dismiss and granted the motion for leave to file the supplemental complaint. The Minnesota Supreme Court affirmed, ultimately holding that the assertion of *quasi in rem* jurisdiction under the Minnesota garnishment statute complied with the due process standards enunciated in *Shaffer* v. *Heitner*, 433 U. S. 186.

Held: A State may not constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit. Pp. 327-333.

(a) A State may exercise jurisdiction over an absent defendant only if the defendant has certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co.* v. *Washington*, 326 U. S. 310. In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, *supra*, at 204. P. 327.

(b) Here, the only affiliating circumstance offered to show a relationship among Rush, Minnesota, and this lawsuit is that Rush's insurance

company does business in the State. However, the fictional presence in Minnesota of State Farm's policy obligation to defend and indemnify Rush—derived from combining the legal fiction that assigns a situs to a debt, for garnishment purposes, wherever the debtor is found with the legal fiction that a corporation is "present," for jurisdictional purposes, wherever it does business—cannot be deemed to give the State the power to determine Rush's liability for the out-of-state accident. The mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action, and it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable merely because his insurer does business there. Nor does the policy provide significant contacts between the litigation and the forum, for the policy obligations pertain only to the conduct, not the substance, of the litigation. Pp. 327–330.

(c) Moreover, the requisite minimum contacts with the forum cannot be established under an alternative approach attributing the insurer's forum contacts to the defendant by treating the attachment procedure as the functional equivalent of a direct action against the insurer, and considering the insured a "nominal defendant" in order to obtain jurisdiction over the insurer. The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee, and if the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Nor may the Minnesota court attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it has jurisdiction. The parties' relationships with each other may be significant in evaluating their ties to the forum, but the requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction. Pp. 330–332.

272 N. W. 2d 888, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., *ante*, p. 299, and STEVENS, J., *post*, p. 333, filed dissenting opinions.

O. C. Adamson II argued the cause for appellants. With him on the briefs was *James F. Roegge*.

Edward H. Borkon argued the cause and filed a brief for appellee.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This appeal presents the question whether a State may constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts by attaching the contractual obligation of an insurer licensed to do business in the State to defend and indemnify him in connection with the suit.

I

On January 13, 1972, two Indiana residents were involved in a single-car accident in Elkhart, Ind. Appellee Savchuk, who was a passenger in the car driven by appellant Rush, was injured. The car, owned by Rush's father, was insured by appellant State Farm Mutual Automobile Insurance Co. (State Farm) under a liability insurance policy issued in Indiana. Indiana's guest statute would have barred a claim by Savchuk. Ind. Code § 9–3–3–1 (1976).

Savchuk moved with his parents to Minnesota in June 1973.[1] On May 28, 1974, he commenced an action against Rush in the Minnesota state courts.[2] As Rush had no contacts with Minnesota that would support *in personam* jurisdiction, Savchuk attempted to obtain *quasi in rem* jurisdiction by garnishing State Farm's obligation under the insurance policy to defend and indemnify Rush in connection with such a suit.[3] State Farm does business in Minnesota.[4] Rush was

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[1] Savchuk moved to Pennsylvania after this appeal was filed.

[2] The suit was filed after the 2-year Indiana statute of limitations had run. 272 N. W. 2d 888, 891, n. 5 (1978).

[3] Minnesota Stat. § 571.41, subd. 2 (1978), provides in relevant part: "Notwithstanding anything to the contrary herein contained, a plaintiff in

[*Footnote 4 is on p. 323*]

personally served in Indiana. The complaint alleged negligence and sought $125,000 in damages.[5]

As provided by the state garnishment statute, Savchuk moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action after State Farm's response to the garnishment summons asserted that it owed the defendant nothing.[6] Rush and State

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any action in a court of record for the recovery of money may issue a garnishee summons before judgment therein in the following instances only:

. . . . .

"(b) If the court shall order the issuance of such summons, if a summons and complaint is filed with the appropriate court and either served on the defendant or delivered to a sheriff for service on the defendant not more than 30 days after the order is signed, and if, upon application to the court it shall appear that:

. . . . .

"(2) The purpose of the garnishment is to establish quasi in rem jurisdiction and that

. . . . .

"(b) defendant is a nonresident individual, or a foreign corporation, partnership or association.

"(3) The garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

The Minnesota Supreme Court cited this version of the statute, enacted in 1976, in its opinion in 272 N. W. 2d 888 (1978) (*Savchuk II*). The version of the statute that was in effect at the time of the original opinion, 311 Minn. 480, 245 N. W. 2d 624 (1976) (*Savchuk I*), does not differ in any important respect.

[4] State Farm is an Illinois corporation that does business in all 50 States, the District of Columbia, and several Canadian Provinces. The Insurance Almanac 431–432 (1977).

[5] The prayer was later reduced voluntarily to $50,000, the face amount of the policy.

[6] Minnesota Stat. § 571.495 (1978) requires the garnishee to disclose the amount of his debt to the defendant. Section 571.51 provides in relevant part:

"[I]n all . . . cases where the garnishee denies liability, the judgment creditor may move the court at any time before the garnishee is discharged,

Farm moved to dismiss the complaint for lack of jurisdiction over the defendant.[7] The trial court denied the motion to dismiss and granted the motion for leave to file the supplemental complaint.

On appeal, the Minnesota Supreme Court affirmed the trial court's decision. 311 Minn. 480, 245 N. W. 2d 624 (1976) (*Savchuk I*). It held, first, that the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy is a garnishable res in Minnesota for the purpose of obtaining *quasi in rem* jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff is a Minnesota resident when the suit is filed. Second, the court held that the assertion of jurisdiction over Rush was constitutional because he had notice of the suit and an opportunity to defend, his liability was limited to the amount of the policy, and the garnishment procedure may be used only by Minnesota residents. The court expressly recognized that Rush had engaged in no voluntary activity that would justify the exercise of *in personam* jurisdiction. The court found, however, that considerations of fairness supported the exercise of *quasi in rem* jurisdiction because in accident litigation the insurer controls the defense of the case, State Farm does business in and is regulated by the State, and the State has an interest in protecting its residents and providing them with a forum in which to litigate their claims.

Rush appealed to this Court. We vacated the judgment and remanded the cause for further consideration in light of

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on notice to both the judgment debtor and the garnishee, for leave to file a supplemental complaint making the latter a party to the action, and setting forth the facts upon which he claims to charge him; and, if probable cause is shown, such motion shall be granted. . . ." Minn. Stat. § 571.51 (1978).

The party-garnishee is not a defendant.

[7] The motion to dismiss also alleged lack of subject-matter jurisdiction, insufficiency of process, and insufficiency of service of process.

Shaffer v. *Heitner,* 433 U. S. 186 (1977). 433 U. S. 902 (1977).

On remand, the Minnesota Supreme Court held that the assertion of *quasi in rem* jurisdiction through garnishment of an insurer's obligation to an insured complied with the due process standards enunciated in *Shaffer.* 272 N. W. 2d 888 (1978) (*Savchuk II*). The court found that the garnishment statute differed from the Delaware stock sequestration procedure held unconstitutional in *Shaffer* because the garnished property was intimately related to the litigation and the garnishment procedure paralleled the asserted state interest in "facilitating recoveries for resident plaintiffs." 272 N. W. 2d, at 891.[8] This appeal followed.

II

The Minnesota Supreme Court held that the Minnesota garnishment statute embodies the rule stated in *Seider* v. *Roth,* 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966), that the contractual obligation of an insurance company to its insured under a liability insurance policy is a debt subject to attachment under state law if the insurer does business in the State.[9] *Seider* jurisdiction was upheld against a due process challenge in *Simpson* v. *Loehmann,* 21 N. Y. 2d 305, 234 N. E. 2d 669 (1967), reargument denied, 21 N. Y. 2d 990, 238 N. E. 2d 319 (1968). The New York court relied on *Harris* v. *Balk,* 198 U. S. 215 (1905), in holding that the presence of the debt

[8] Minnesota would apply its own comparative negligence law, rather than Indiana's contributory negligence rule. See *Schwartz* v. *Consolidated Freightways Corp.,* 300 Minn. 487, 221 N. W. 2d 665 (1974). Appellants assert that Minnesota would also decline to apply the Indiana guest statute if this case were tried in Minnesota. Juris. Statement 10, n. 2; cf. *Savchuk II, supra,* at 891–892. The constitutionality of a choice-of-law rule that would apply forum law in these circumstances is not before us. Cf. *Home Ins. Co.* v. *Dick,* 281 U. S. 397 (1930).

[9] 272 N. W. 2d., at 891.

in the State was sufficient to permit *quasi in rem* jurisdiction over the absent defendant. The court also concluded that the exercise of jurisdiction was permissible under the Due Process Clause because, "[v]iewed realistically, the insurer in a case such as the present is in full control of the litigation" and "where the plaintiff is a resident of the forum state and the insurer is present in and regulated by it, the State has a substantial and continuing relation with the controversy." *Simpson* v. *Loehmann, supra,* at 311, 234 N. E. 2d, at 672.

The United States Court of Appeals for the Second Circuit gave its approval to *Seider* in *Minichiello* v. *Rosenberg,* 410 F. 2d 106, adhered to en banc, 410 F. 2d 117 (1968), cert. denied, 396 U. S. 844 (1969), although on a slightly different rationale. Judge Friendly construed *Seider* as "in effect a judicially created direct action statute. The insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer." 410 F. 2d, at 109; see *Donawitz* v. *Danek,* 42 N. Y. 2d 138, 142, 366 N. E. 2d 253, 255 (1977). The court held that New York could constitutionally enact a direct action statute, and that the restriction of liability to the amount of the policy coverage made the policyholder's personal stake in the litigation so slight that the exercise of jurisdiction did not offend due process.

New York has continued to adhere to *Seider*.[10] New Hampshire has followed *Seider* if the defendant resides in a *Seider* jurisdiction,[11] but not in other cases.[12] Minnesota is the only

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[10] *Baden* v. *Staples,* 45 N. Y. 2d 889, 383 N. E. 2d 110 (1978). The State has declined, however, to make the attachment procedure available to nonresident plaintiffs. *Donawitz* v. *Danek,* 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977).

[11] *Forbes* v. *Boynton,* 113 N. H. 617, 313 A. 2d 129 (1973). But cf. *Rocca* v. *Kenney,* 117 N. H. 1057, 381 A. 2d 330 (1977).

[12] *Camire* v. *Scieszka,* 116 N. H. 281, 358 A. 2d 397 (1976).

other State that has adopted *Seider*-type jurisdiction.[13] The Second Circuit recently reaffirmed its conclusion that *Seider* does not violate due process after reconsidering the doctrine in light of *Shaffer* v. *Heitner*. *O'Conner* v. *Lee-Hy Paving Corp.*, 579 F. 2d 194, cert. denied, 439 U. S. 1034 (1978).

III

In *Shaffer* v. *Heitner* we held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." 433 U. S., at 212. That is, a State may exercise jurisdiction over an absent defendant only if the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co.* v. *Washington*, 326 U. S. 310, 316 (1945). In determining whether a particular exercise of state-court jurisdiction is consistent with due process, the inquiry must focus on "the relationship among the defendant, the forum, and the litigation." *Shaffer* v. *Heitner*, *supra*, at 204.

It is conceded that Rush has never had any contacts with Minnesota, and that the auto accident that is the subject of

[13] The practice has been rejected, based on state law or constitutional grounds, in *Belcher* v. *Government Employees Ins. Co.*, 282 Md. 718, 387 A. 2d 770 (1978); *Javorek* v. *Superior Court*, 17 Cal. 3d 629, 552 P. 2d 728 (1976); *Hart* v. *Cote*, 145 N. J. Super. 420, 367 A. 2d 1219 (Law Div. 1976); *Grinnell* v. *Garrett*, 295 So. 2d 496 (La. App. 1974); *Johnson* v. *Farmers Alliance Mutual Ins. Co.*, 499 P. 2d 1387 (Okla. 1972); *State ex rel. Government Employees Ins. Co.* v. *Lasky*, 454 S. W. 2d 942 (Mo. App. 1970); *Howard* v. *Allen*, 254 S. C. 455, 176 S. E. 2d 127 (1970); *De Rentiis* v. *Lewis*, 106 R. I. 240, 258 A. 2d 464 (1969); *Housley* v. *Anaconda Co.*, 19 Utah 2d 124, 427 P. 2d 390 (1967); *Jardine* v. *Donnelly*, 413 Pa. 474, 198 A. 2d 513 (1964). See also *Tessier* v. *State Farm Mutual Ins. Co.*, 458 F. 2d 1299 (CA1 1972); *Kirchman* v. *Mikula*, 443 F. 2d 816 (CA5 1971); *Robinson* v. *O. F. Shearer & Sons*, 429 F. 2d 83 (CA3 1970); *Sykes* v. *Beal*, 392 F. Supp. 1089 (Conn. 1975); *Ricker* v. *Lajoie*, 314 F. Supp. 401 (Vt. 1970).

this action occurred in Indiana and also had no connection to Minnesota. The only affiliating circumstance offered to show a relationship among Rush, Minnesota, and this lawsuit is that Rush's insurance company does business in the State. *Seider* constructed an ingenious jurisdictional theory to permit a State to command a defendant to appear in its courts on the basis of this factor alone. State Farm's contractual obligation to defend and indemnify Rush in connection with liability claims is treated as a debt owed by State Farm to Rush. The legal fiction that assigns a situs to a debt, for garnishment purposes, wherever the debtor is found is combined with the legal fiction that a corporation is "present," for jurisdictional purposes, wherever it does business to yield the conclusion that the obligation to defend and indemnify is located in the forum for purposes of the garnishment statute. The fictional presence of the policy obligation is deemed to give the State the power to determine the policyholder's liability for the out-of-state accident.[14]

We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action. The ownership of property in the State is *a* contact between the defendant and the forum, and it may suggest the presence of other ties. 433 U. S., at 209. Jurisdiction is lacking, however, unless there are sufficient contacts to satisfy the fairness standard of *International Shoe*.

Here, the fact that the defendant's insurer does business in the forum State suggests no further contacts between the defendant and the forum, and the record supplies no evidence of any. State Farm's decision to do business in Minnesota

[14] The conclusion that State Farm's obligation under the insurance policy was garnishable property is a matter of state law and therefore is not before us. Assuming that it was garnishable property, the question is what significance that fact has to the relationship among the defendant, the forum, and the litigation.

was completely adventitious as far as Rush was concerned. He had no control over that decision, and it is unlikely that he would have expected that by buying insurance in Indiana he had subjected himself to suit in any State to which a potential future plaintiff might decide to move. In short, it cannot be said that the *defendant* engaged in any purposeful activity related to the forum that would make the exercise of jurisdiction fair, just, or reasonable, see *Kulko* v. *California Superior Court*, 436 U. S. 84, 93–94 (1978); *Hanson* v. *Denckla*, 357 U. S. 235, 253 (1958), merely because his insurer does business there.

Nor are there significant contacts between the litigation and the forum. The Minnesota Supreme Court was of the view that the insurance policy was so important to the litigation that it provided contacts sufficient to satisfy due process.[15] The insurance policy is not the subject matter of the case, however, nor is it related to the operative facts of the negligence action. The contractual arrangements between the defendant and the insurer pertain only to the conduct, not the substance, of the litigation, and accordingly do not affect the court's jurisdiction unless they demonstrate ties between the defendant and the forum.

In fact, the fictitious presence of the insurer's obligation in Minnesota does not, without more, provide a basis for concluding that there is *any* contact in the *International Shoe* sense

[15] The court explained: "In the instant case, the insurer's obligation to defend and indemnify, while theoretically separable from the tort action, has *no* independent value or significance apart from accident litigation. In the accident litigation, however, it is inevitably the focus, determining the rights and obligation [*sic*] of the insurer, the insured, and practically speaking, the victim." *Savchuk II*, 272 N. W. 2d, at 892 (emphasis in original). The court considered the "practical relationship between the insurer and the nominal defendant," *ibid.*, the limitation of liability to the policy amount, and the restriction of the garnishment procedure to resident plaintiffs, and concluded that "the relationship between the defending parties, the litigation, and the forum state," *id.*, at 893, was sufficient to sustain the exercise of jurisdiction.

between Minnesota and the insured. To say that "a debt follows the debtor" is simply to say that intangible property has no actual situs, and a debt may be sued on wherever there is jurisdiction over the debtor. State Farm is "found," in the sense of doing business, in all 50 States and the District of Columbia. Under appellee's theory, the "debt" owed to Rush would be "present" in each of those jurisdictions simultaneously. It is apparent that such a "contact" can have no jurisdictional significance.

An alternative approach for finding minimum contacts in *Seider*-type cases, referred to with approval by the Minnesota Supreme Court,[16] is to attribute the insurer's forum contacts to the defendant by treating the attachment procedure as the functional equivalent of a direct action against the insurer. This approach views *Seider* jurisdiction as fair both to the insurer, whose forum contacts would support *in personam* jurisdiction even for an unrelated cause of action, and to the "nominal defendant." Because liability is limited to the policy amount, the defendant incurs no personal liability,[17] and the judgment is satisfied from the policy proceeds which are not available to the insured for any purpose other than paying accident claims, the insured is said to have such a slight stake in the litigation as a practical matter that it is not unfair to make him a "nominal defendant" in order to obtain jurisdiction over the insurance company.

Seider actions are not equivalent to direct actions, however.[18] The State's ability to exert its power over the "nomi-

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[16] *Id.*, at 892–893; but see *Savchuk I*, 311 Minn., at 488, 245 N. W. 2d, at 629.

[17] See *Savchuk II*, 272 N. W. 2d, at 892; *Simpson* v. *Loehmann*, 21 N. Y. 2d 990, 991, 238 N. E. 2d 319, 320 (1968).

[18] In *Savchuk I*, the Minnesota Supreme Court rejected Rush's argument that the garnishment procedure amounted to a direct action, observing: "The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant." 311 Minn., at 488, 245 N. W. 2d, at 629. See n. 6, *supra*.

nal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Because the party with forum contacts can only be reached through the out-of-state party, the question of jurisdiction over the nonresident cannot be ignored.[19] Moreover, the assumption that the defendant has no real stake in the litigation is far from self-evident.[20]

The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the "defending parties" together and aggregating their forum contacts in determining whether it had jurisdiction.[21] The result was the

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[19] Compare the direct action statute upheld in *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), which was applicable only if the accident or injury occurred in the State or the insured was domiciled there and which permitted the plaintiff to sue the insurer alone, without naming the insured as a defendant. *Id.*, at 68, n. 4.

[20] A party does not extinguish his legal interest in a dispute by insuring himself against having to pay an eventual judgment out of his own pocket. Moreover, the purpose of insurance is simply to make the defendant whole for the economic costs of the lawsuit; but noneconomic factors may also be important to the defendant. Professional malpractice actions, for example, question the defendant's integrity and competence and may affect his professional standing. Cf. *Donawitz* v. *Danek*, 42 N. Y. 2d 138, 366 N. E. 2d 253 (1977) (medical malpractice action premised on *Seider* jurisdiction dismissed because plaintiff was a nonresident). Further, one can easily conceive of cases in which the defendant might have a substantial economic stake in *Seider* litigation—if, for example, multiple plaintiffs sued in different States for an aggregate amount in excess of the policy limits, or if a successful claim would affect the policyholder's insurability. For these reasons, the defendant's interest in the adjudication of his liability cannot reasonably be characterized as *de minimis*.

[21] The court stated: "We view as relevant the relationship between the *defending parties*, the litigation, and the forum state. It cannot be said that Minnesota lacks such minimally-requisite 'contacts, ties or relations' to those *defending parties* as to offend the requirements of due process." *Savchuk II*, 272 N. W. 2d, at 893 (emphasis added).

assertion of jurisdiction over Rush based solely on the activities of State Farm. Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, must be met as to each defendant over whom a state court exercises jurisdiction.

The justifications offered in support of *Seider* jurisdiction share a common characteristic: they shift the focus of the inquiry from the relationship among the defendant, the forum, and the litigation to that among the plaintiff, the forum, the insurer, and the litigation. The insurer's contacts with the forum are attributed to the defendant because the policy was taken out in anticipation of such litigation. The State's interests in providing a forum for its residents and in regulating the activities of insurance companies are substituted for its contacts with the defendant and the cause of action. This subtle shift in focus from the defendant to the plaintiff is most evident in the decisions limiting *Seider* jurisdiction to actions by forum residents on the ground that permitting nonresidents to avail themselves of the procedure would be unconstitutional.[22] In other words, the plaintiff's contacts with the forum are decisive in determining whether the defendant's due process rights are violated.

Such an approach is forbidden by *International Shoe* and its progeny. If a defendant has certain judicially cognizable ties with a State, a variety of factors relating to the particular cause of action may be relevant to the determination whether the exercise of jurisdiction would comport with "traditional notions of fair play and substantial justice." See *McGee* v. *International Life Ins. Co.*, 355 U. S. 220 (1957); cf. *Kulko* v. *California Superior Court*, 436 U. S., at 98–101. Here, however, the defendant has *no* contacts with the forum, and the

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[22] See, *e. g.*, *Farrell* v. *Piedmont Aviation, Inc.*, 411 F. 2d 812 (CA2 1969); *Rintala* v. *Shoemaker*, 362 F. Supp. 1044 (Minn. 1973); *Donawitz* v. *Danek*, *supra*; *Savchuk I*.

Due Process Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co.* v. *Washington*, 326 U. S., at 319. The judgment of the Minnesota Supreme Court is, therefore,

Reversed.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 299.]

MR. JUSTICE STEVENS, dissenting.

As the Court notes, appellant Rush had no contact with Minnesota that would support personal jurisdiction over him in that State. *Ante*, at 322. Moreover, *Shaffer* v. *Heitner*, 433 U. S. 186, precludes the assertion of *quasi in rem* jurisdiction over his property in that forum if the intangible property attached is unrelated to the action. It does not follow, however, that the plaintiff may not obtain *quasi in rem* jurisdiction over appellant's insurance policy, since his carrier does business in Minnesota and since it has also specifically contracted in the policy attached to defend the very litigation that plaintiff has instituted in Minnesota.

In this kind of case, the Minnesota statute authorizing jurisdiction is correctly characterized as the "functional equivalent" of a so-called direct-action statute. The impact of the judgment is against the insurer.* I believe such a direct-action statute is valid as applied to a suit brought by a forum resident, see *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66, 72, even if the accident giving rise to the action did not occur in the forum State, see *Minichiello* v. *Rosenberg*,

*It seems to me that the possible impact of a default judgment on the reputation of an individual, see *ante*, at 331, n. 20, who has no contacts whatever with the forum State is far too remote to affect the analysis of the constitutional issue in this case.

410 F. 2d 106 (CA2 1968), cert. denied, 396 U. S. 844, so long as it is understood that the forum may exercise no power whatsoever over the individual defendant. As so understood, it makes no difference whether the insurance company is sued in its own name or, as Minnesota law provides, in the guise of a suit against the individual defendant.

In this case, although appellant Rush may have a contractual obligation to his insurer to appear in court to testify and generally to cooperate in the defense of the lawsuit, it is my understanding that Minnesota law does not compel him to do so through the contempt power or otherwise. Moreover, any judgment formally entered against the individual defendant may only be executed against the proceeds of his insurance policy. In my opinion, it would violate the Due Process Clause to make any use of such a judgment against that individual—for example, by giving the judgment collateral-estoppel effect in a later action against him arising from the same accident. Accord, *Minichiello* v. *Rosenberg*, *supra*, at 112; Note, The Constitutionality of *Seider* v. *Roth* after *Shaffer* v. *Heitner*, 78 Colum. L. Rev. 409, 418–419 (1978). But we are not now faced with any problem concerning use of a *quasi in rem* judgment against an individual defendant personally. I am therefore led to the conclusion that the Federal Constitution does not require the Minnesota courts to dismiss this action.

OHIO *v.* KENTUCKY

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 27, Orig. Argued December 3, 1979—Decided January 21, 1980

Held: The boundary between Ohio and Kentucky is the low-water mark on the northerly side of the Ohio River as it existed in 1792 when Kentucky was admitted to the Union, not the current low-water mark on the northerly side of the river. Historical factors establish that the boundary is not the Ohio River just as a boundary river, but is the northerly edge. Thus, the accepted rules of accretion and avulsion attendant upon a wandering river that are applicable in customary situations involving river boundaries between States, do not apply here. *Indiana* v. *Kentucky*, 136 U. S. 479, controls this case. Pp. 337–341.

Exceptions to Special Master's report overruled, report adopted, and case remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which WHITE and REHNQUIST, JJ., joined, *post*, p. 341.

James M. Ringo, Assistant Attorney General of Kentucky, argued the cause for defendant. With him on the briefs were *Robert F. Stephens*, Attorney General, and *George F. Rabe*.

Michael R. Szolosi argued the cause for plaintiff. With him on the brief were *William J. Brown*, Attorney General of Ohio, *Howard B. Abramoff*, Assistant Attorney General, and *Stephen C. Fitch*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The State of Ohio, in 1966, instituted this action, under the Court's original jurisdiction, against the Commonwealth of Kentucky. By its bill of complaint as initially filed, Ohio asked that the Court declare and establish that the boundary line between the two States is "the low water mark on the

northerly side of the Ohio River in the year 1792." Leave to file the bill of complaint was granted. 384 U. S. 982 (1966). In due course, Kentucky filed its answer and a Special Master was appointed. 385 U. S. 803 (1966). In its answer, Kentucky alleged that the boundary line is the current low-water mark on the northerly side of the Ohio River.

Ohio later moved for leave to file an amended complaint that would assert, primarily, that the boundary between Ohio and Kentucky is the middle of the Ohio River, and, only alternatively, is the 1792 low-water mark on the northerly shore. That motion was referred to the Special Master. 404 U. S. 933 (1971). The Special Master held a hearing and in due course filed his report recommending that Ohio's petition for leave to amend be denied. 406 U. S. 915 (1972). Upon the filing of Ohio's exceptions and Kentucky's reply, the matter was set for hearing. 409 U. S. 974 (1972). After argument, the Special Master's recommendation was adopted, Ohio's motion for leave to amend was denied, and the case was remanded. 410 U. S. 641 (1973).

The Honorable Robert Van Pelt, who by then had been appointed Special Master following the resignation of his predecessor, thereafter filed his report on the case as shaped by the original pleadings. That report was received and ordered filed. 439 U. S. 1123 (1979). Kentucky lodged exceptions to the report, and Ohio filed its reply. Oral argument followed.

The Special Master recommends that this Court determine that the boundary between Ohio and Kentucky "is the low-water mark on the northerly side of the Ohio River as it existed in the year 1792"; that the boundary "is not the low-water mark on the northerly side of the Ohio River as it exists today"; and that such boundary, "as nearly as it can now be ascertained, be determined either a) by agreement of the parties, if reasonably possible, or b) by joint survey agreed upon by the parties," or, in the absence of such an agreement or

survey, after hearings conducted by the Special Master and the submission by him to this Court of proposed findings and conclusions. Report of Special Master 16.

We agree with the Special Master. Much of the history concerning Virginia's cession to the United States of lands "northwest of the river Ohio" was reviewed and set forth in the Court's opinion concerning Ohio's motion for leave to amend its 1966 complaint. 410 U. S., at 645–648. Upon the denial of Ohio's motion, the case was left in the posture that the boundary between the two States was the river's northerly low-water mark. The litigation, thus, presently centers on where that northerly low-water mark is—is it the mark of 1792 when Kentucky was admitted to the Union, ch. IV, 1 Stat. 189, or is it a still more northerly mark due to the later damming of the river and the consequent rise of its waters?

It should be clear that the Ohio River between Kentucky and Ohio, or, indeed, between Kentucky and Indiana, is not the usual river boundary between States. It is not like the Missouri River between Iowa and Nebraska, see, *e. g.*, *Nebraska* v. *Iowa*, 143 U. S. 359 (1892), or the Mississippi River between Arkansas and Mississippi. See *Mississippi* v. *Arkansas*, 415 U. S. 289 (1974), and 415 U. S. 302 (1974). See also *Iowa* v. *Illinois*, 147 U. S. 1 (1893); *Missouri* v. *Nebraska*, 196 U. S. 23 (1904); *Minnesota* v. *Wisconsin*, 252 U. S. 273 (1920); *New Jersey* v. *Delaware*, 291 U. S. 361 (1934); *Arkansas* v. *Tennessee*, 310 U. S. 563 (1940). In these customary situations the well-recognized and accepted rules of accretion and avulsion attendant upon a wandering river have full application.

A river boundary situation, however, depending upon historical factors, may well differ from that customary situation. See, for example, *Texas* v. *Louisiana*, 410 U. S. 702 (1973), where the Court was concerned with the Sabine River, Lake, and Pass. And in the Kentucky-Ohio and Kentucky-Indiana boundary situation, it is indeed different. Here the boundary

is not the Ohio River just as a boundary river, but is the northerly edge, with originally Virginia and later Kentucky entitled to the river's expanse. This is consistently borne out by, among other documents, the 1781 Resolution of Virginia's General Assembly for the cession to the United States ("the lands northwest of the river Ohio"), 10 W. Hening, Laws of Virginia 564 (1822); the Virginia Act of 1783 ("the territory . . . to the north-west of the river Ohio"), 11 W. Hening, Laws of Virginia 326, 327 (1823); and the deed from Virginia to the United States ("the territory . . . to the northwest of the river Ohio") accepted by the Continental Congress on March 1, 1784, 1 Laws of the United States 472, 474 (B. & D. ed. 1815). The Court acknowledged this through Mr. Chief Justice Marshall's familiar pronouncement with respect to the Ohio River in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, 379 (1820):

> "When a great river is the boundary between two nations or states, if the original property is in neither, and there be no convention respecting it, each holds to the middle of the stream. But when, as in this case, one State is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State extends to the river only. The river, however, is its boundary."

The dissent concedes as much. *Post*, at 342. The dissent then, however, would be persuaded by whatever is "the current low-water mark on the northern shore." *Post*, at 343. But it is far too late in the day to equate the Ohio with the Missouri, with the Mississippi, or with any other boundary river that does not have the historical antecedents possessed by the Ohio, antecedents that fix the boundary not as the river itself, but as its northerly bank. *Handly's Lessee*, in our view, supports Ohio's position, not the dissent's. If there could be any doubt about this, it surely was dispelled completely when the Court decided *Indiana* v. *Kentucky*, 136 U. S. 479 (1890).

There Mr. Justice Field, speaking for a unanimous Court, said:

> "[Kentucky] succeeded to the ancient right and possession of Virginia, and they could not be affected by any subsequent change of the Ohio River, or by the fact that the channel in which that river once ran is now filled up from a variety of causes, natural and artificial, so that parties can pass on dry land from the tract in controversy to the State of Indiana. Its water might so depart from its ancient channel as to leave on the opposite side of the river entire counties of Kentucky, and the principle upon which her jurisdiction would then be determined is precisely that which must control in this case. *Missouri* v. *Kentucky*, 11 Wall. 395, 401. Her dominion and jurisdiction continue as they existed at the time she was admitted into the Union, unaffected by the action of the forces of nature upon the course of the river.
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> . . . . .
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> "Our conclusion is, that the waters of the Ohio River, when Kentucky became a State, flowed in a channel north of the tract known as Green River Island, and that the jurisdiction of Kentucky at that time extended, and ever since has extended, to what was then low-water mark on the north side of that channel, and the boundary between Kentucky and Indiana must run on that line, as nearly as it can now be ascertained, after the channel has been filled." *Id.*, at 508, 518–519.

The fact that *Indiana* v. *Kentucky* concerned a portion of the Ohio River in its Indiana-Kentucky segment, rather than a portion in its Ohio-Kentucky segment, is of no possible legal consequence; the applicable principles are the same, and the holding in *Indiana* v. *Kentucky* has pertinent application and is controlling precedent here. The Court's flat pronouncements in *Indiana* v. *Kentucky* are not to be rationalized away so readily as the dissent, *post*, at 343–345, would have

them cast aside. Kentucky's present contentions, and those of the dissent, were rejected by this Court 90 years ago.

We are not disturbed by the fact that boundary matters between Ohio and Kentucky by the Court's holding today will turn on the 1792 low-water mark of the river. Locating that line, of course, may be difficult, and utilization of a current, and changing, mark might well be more convenient. But knowledgeable surveyors, as the Special Master's report intimates, have the ability to perform this task. Like difficulties have not dissuaded the Court from concluding that locations specified many decades ago are proper and definitive boundaries. See, *e. g.*, *Utah* v. *United States*, 420 U. S. 304 (1975), and 427 U. S. 461 (1976); *New Hampshire* v. *Maine*, 426 U. S. 363 (1976), and 434 U. S. 1 (1977). The dissent's concern about the possibility, surely extremely remote, that the comparatively stable Ohio River might "pass completely out of Kentucky's borders," *post*, at 343, is of little weight. Situations where land of one State comes to be on the "wrong" side of its boundary river are not uncommon. See *Wilson* v. *Omaha Indian Tribe*, 442 U. S. 653 (1979); *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 369, n. 5 (1978); *Missouri* v. *Nebraska*, 196 U. S. 23 (1904).

Finally, it is of no little interest that Kentucky sources themselves, in recent years, have made reference to the 1792 low-water mark as the boundary. Informational Bulletin No. 93 (1972), issued by the Legislative Research Commission of the Kentucky General Assembly, states:

> "Kentucky's North and West boundary, to-wit, the low water mark on the North shore of the Ohio River as of 1792, has been recognized as the boundary based upon the fact that Kentucky was created from what was then Virginia." *Id.*, at 3.

See also the opinion of the Attorney General of Kentucky, OAG 63–847, contained in Kentucky Attorney General Opinions 1960–1964. See also *Perks* v. *McCracken*, 169 Ky. 590,

184 S. W. 891 (1916), where the court stated that the question in the case was "where was the low water mark at the time Kentucky became a State."

The exceptions of the Commonwealth of Kentucky to the report of the Special Master are overruled. The report is hereby adopted, and the case is remanded to the Special Master so that with the cooperation of the parties he may prepare and submit to the Court an appropriate form of decree.

MR. JUSTICE POWELL, with whom MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the present boundary between Ohio and Kentucky is the low-water mark of the northern shore of the Ohio River when Kentucky was admitted to the Union in 1792. This curious result frustrates the terms of the Virginia Cession of 1784 that first established the Ohio-Kentucky border, ignores Mr. Chief Justice Marshall's construction of that grant in *Handly's Lessee* v. *Anthony*, 5 Wheat. 374 (1820), is contrary to common-law rules of riparian boundaries, and creates a largely unidentifiable border. Accordingly, I dissent.

I

In 1784, the Commonwealth of Virginia ceded to the United States all of its territory "to the northwest of the river Ohio." 1 Laws of the United States 472, 474 (B. & D. ed. 1815). As this Court recently observed, the border question " 'depends chiefly on the land law of Virginia, and on the cession made by that State to the United States.' " *Ohio* v. *Kentucky*, 410 U. S. 641, 645 (1973), quoting *Handly's Lessee* v. *Anthony, supra*, at 376. The 1784 Cession was construed definitively in *Handly's Lessee*, a case involving a dispute over land that was connected to Indiana when the Ohio River was low, but which was separated from Indiana when the water was high. The Court held that since the 1784 Cession required that the river remain within Kentucky, the proper

border was the low-water mark on the northern or northwestern shore. Consequently, the land in issue belonged to Indiana.

Mr. Chief Justice Marshall, writing for the Court, pointed out that Virginia originally held the land that became both Indiana and Kentucky. Under the terms of the Virginia Cession, he stated: "These States, then, are to have *the* [*Ohio*] *river itself, wherever that may be, for their boundary.*" 5 Wheat., at 379 (emphasis supplied). The Chief Justice found support for that conclusion in the original Cession:

> "[W]hen, as in this case, one State [Virginia] is the original proprietor, and grants the territory on one side only, it retains the river within its own domain, and the newly-created State [Indiana] extends to the river only. The river, however, is its boundary." *Ibid.*

Such a riparian border, the Chief Justice emphasized, cannot be stationary over time. He wrote: "Any gradual accretion of land, then, on the Indiana side of the Ohio, would belong to Indiana. . . ." *Id.*, at 380. This rule avoids the "inconvenience" of having a strip of land belonging to one State between another State and the river.

> "Wherever the river is a boundary between States, it is the main, the permanent river, which constitutes that boundary; and the mind will find itself embarrassed with insurmountable difficulty in attempting to draw any other line than the low water mark." *Id.*, at 380–381.

Because the boundary between Ohio and Kentucky was established by the same events that drew the line between Indiana and Kentucky, the holding in *Handly's Lessee* should control this case.[1] The Ohio River must remain the border between the States and within the domain of Kentucky. The

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[1] Both parties to this litigation agree that the boundary between Kentucky and Ohio is controlled by the same legal and historical considerations that define the boundary between Indiana and Kentucky.

only way to ensure this result is to recognize the current low-water mark on the northern shore as the boundary.

The approach taken by the Court today defeats the express terms of the Virginia Cession and ignores the explicit language of Mr. Chief Justice Marshall in *Handly's Lessee*.[2] The Court's holding that the boundary forever remains where the low-water mark on the northern shore of the river was in 1792, regardless of the river's movements over time, may produce bizarre results. If erosion and accretion were to shift the river to the north of the 1792 low-water mark, today's ruling would place the river entirely within the State of Ohio. The river would thus pass completely out of Kentucky's borders despite the holding in *Handly's Lessee* that the Ohio "[R]iver itself, wherever that may be, [is the] boundary." *Id.*, at 379. The river would not be the boundary between the two States nor would Kentucky as successor to Virginia "retai[n] the river within its own domain" as Mr. Chief Justice Marshall declared that it must. *Ibid.* Similarly, if the river were to move to the south of the 1792 line, Ohio would be denied a shore on the river. Sensible people could not have intended such results, which not only would violate the plain language of the 1784 Cession, but also would mock the congressional resolution accepting Ohio into the Union as a State "bounded . . . on the South by the Ohio [R]iver." Ch. XL, 2 Stat. 173.

II

The Court, like the Special Master, disregards the teaching of *Handly's Lessee*. Instead, the Court relies heavily on the

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[2] Mr. Chief Justice Marshall, the author of *Handly's Lessee*, would seem a particularly reliable interpreter of the 1784 Cession. The Chief Justice was not only a practicing lawyer in Richmond in 1783 and 1784, but also served as a member of the General Assembly of Virginia that approved the Cession. 1 A. Beveridge, The Life of John Marshall 202–241 (1919).

decision in *Indiana* v. *Kentucky*, 136 U. S. 479 (1890), where Mr. Justice Field wrote that with respect to Kentucky's northern border, the State's "dominion and jurisdiction continue as they existed at the time she was admitted into the Union [1792], unaffected by the action of the forces of nature upon the course of the river." *Id.*, at 508; *ante*, at 339. Kentucky argues, with some force, that the Court in 1890 found no change from the 1792 boundary because that case concerned the abandonment of a channel by the river, the sort of avulsive change in course that ordinarily does not alter riparian boundaries. There is no sign of an avulsive change in the length of the Ohio River at issue in this case. Moreover, *Indiana* v. *Kentucky* went on to find that Indiana had acquiesced in Kentucky's prescription of the land at issue. There has been no showing before us that Kentucky has acquiesced to Ohio's claim that the 1792 low-water mark establishes the entire boundary between the two States. See n. 3, *infra*. Absent such a showing, I do not believe the holding in *Indiana* v. *Kentucky* should be applied here.

In any event, the force of Mr. Justice Field's opinion as a precedent may be questioned on its face. The decision cannot be reconciled with *Handly's Lessee* or with any normal or practical construction of Virginia's Cession in 1784. Indeed, the Court's opinion is essentially devoid of reasoning. After reproducing the passages in *Handly's Lessee* that establish that Kentucky must retain jurisdiction over the river, Mr. Justice Field states abruptly that, nevertheless, the boundary should be set at the low-water mark "when Kentucky became a State." 136 U. S., at 508. Mr. Justice Field apparently was unaware that, in effect, he was overruling the case on which he purported to rely. His conclusion is based simply on the startling view that when Kentucky "succeeded to the ancient right and possession of Virginia" in 1792, the new State received a boundary that "could not be affected by any subsequent change of the Ohio River."

Ibid. The opinion offers no further explanation for its holding.

Of course, Kentucky did succeed to Virginia's rights in 1792. After the Cession of 1784, Virginia was entitled to have the river within its jurisdiction and to have the northern low-water mark as the boundary between it and that part of the Northwest Territory that became Ohio and Indiana. Kentucky's entry into the Union could not, without more, replace those rights with the immutable boundary found by Mr. Justice Field. Neither Mr. Justice Field in 1890 nor the State of Ohio in this litigation pointed to any suggestion by Congress in 1792 that it intended such a result.

III

Today's decision also contravenes the common law of riparian boundaries. In a dispute over the line between Arkansas and Tennessee along the Mississippi River, this Court noted:

> "[W]here running streams are the boundaries between States, the same rule applies as between private proprietors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream." *Arkansas* v. *Tennessee*, 246 U. S. 158, 173 (1918).

See *Bonelli Cattle Co.* v. *Arizona*, 414 U. S. 313 (1973). This rule has an intensely practical basis, since it is exceedingly difficult to establish where a river flowed many years ago. Physical evidence of the river's path is almost certain to wash away over time, and documentary evidence either may not survive or may not be reliable.

The Court suggests that the Ohio-Kentucky boundary should not be determined by reference to previous river boundary decisions because the border in this case is not "the river itself, but . . . its northerly bank." *Ante*, at 338. This

contention contradicts Mr. Chief Justice Marshall's statement, quoted by the Court, that with respect to Kentucky's northern border, "'[t]he river, however, is its boundary.'" *Ibid.* In addition, the Court does not explain why established principles of riparian law are inapplicable simply because the northern low-water mark, not the center of the river, is the boundary. Since both lines shift over time, it is only sensible to adopt the common-law view that borders defined by those lines will move with them.[3]

IV

Following today's decision, all boundary matters between Ohio and Kentucky will turn on the location almost 200 years

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[3] The Court seeks support for today's decision from a recent statement by the Legislative Research Committee of the Kentucky General Assembly and a 1963 opinion of the Kentucky Attorney General. *Ante*, at 340. Although both documents refer to the 1792 low-water mark as the proper boundary, they are hardly authoritative pronouncements that should control our outcome. Indeed, other legislative and judicial statements refer to the northern low-water mark without any mention of the 1792 line. See 57 Stat. 248 (interstate Compact between Indiana and Kentucky defining the boundary as the "low-water mark of the right side of the Ohio River"); *Commonwealth* v. *Henderson County*, 371 S. W. 2d 27, 29 (Ky. App. 1963) (Kentucky's boundary is "north or northwest low watermark of the Ohio River"); *Louisville Sand & Gravel Co.* v. *Ralston*, 266 S. W. 2d 119, 121 (Ky. App. 1954) ("'our state boundary is along the north bank of the Ohio river at low-water mark,'" quoting *Willis* v. *Boyd*, 224 Ky. 732, 735, 7 S. W. 2d 216, 218 (1928)).

Under the doctrine of prescription and acquiescence, it may be proved that one party has recognized through its actions a riparian boundary claimed by another party. See *Michigan* v. *Wisconsin*, 270 U. S. 295, 308 (1926). That question, however, is one of fact. The Special Master did not request evidence from the parties on this issue, so it is not properly before us now. We cannot decide such a question on the basis of particular shards of evidence that may come to our attention. In view of the conflicting evidence on the claim of prescription and acquiescence, the correct course would be to return this litigation to the Special Master for findings of fact on that question.

ago of the northern low-water mark of the Ohio River. This cumbersome and uncertain outcome might be justified if it were dictated by unambiguous language in the Virginia Cession. But since the Court's decision is not only unworkable but also does violence to that deed as it has been construed by this Court, I cannot agree with its ruling today.

BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78–1006. Argued November 6, 1979—Decided January 21, 1980

Air Force regulations require members of that service to obtain approval from their commanders before circulating petitions on Air Force bases. Respondent Air Force Reserve officer was removed from active duty for distributing on an Air Force base petitions to Members of Congress and the Secretary of Defense, which complained about Air Force grooming standards, without having obtained approval of the base commander as required by the regulations. Respondent then brought suit in District Court challenging the validity of the regulations. That court granted summary judgment for respondent, declaring the regulations facially invalid, and the Court of Appeals affirmed.

Held: The regulations are not invalid on their face. Pp. 353–361.

(a) Such regulations do not violate the First Amendment. *Greer* v. *Spock*, 424 U. S. 828. They protect a substantial Government interest unrelated to the suppression of free expression—the interest in maintaining the respect for duty and discipline so vital to military effectiveness—and restrict speech no more than is reasonably necessary to protect such interest. Since a military commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force. Pp. 353–358.

(b) Nor do the regulations violate 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress. As § 1034's legislative history makes clear, Congress enacted the statute to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels, and not to protect the circulation of collective petitions within a military base. Permitting an individual serviceman to submit a petition directly to any Member of Congress serves § 1034's legislative purpose without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. Pp. 358–361.

586 F. 2d 675, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a

dissenting opinion, *post*, p. 361. STEWART, J., filed a dissenting opinion in which BRENNAN, J., joined, *post*, p. 374. STEVENS, J., filed a dissenting opinion, *post*, p. 378. MARSHALL, J., took no part in the consideration or decision of the case.

Kent L. Jones argued the cause *pro hac vice* for petitioners. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Babcock*, and *Robert E. Kopp*.

David M. Cobin, by appointment of the Court, 441 U. S. 930, argued the cause for respondent. With him on the brief was *Melvin K. Dayley*.

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves challenges to United States Air Force regulations that require members of the service to obtain approval from their commanders before circulating petitions on Air Force bases. The first question is whether the regulations violate the First Amendment. The second question is whether prohibiting the unauthorized circulation of petitions to Members of Congress violates 10 U. S. C. § 1034, which proscribes unwarranted restrictions on a serviceman's right to communicate with a Member of Congress.

I

The Air Force regulations recognize that Air Force personnel have the right to petition Members of Congress and other public officials. Air Force Reg. 30–1 (9) (1971). The regulations, however, prohibit "any person within an Air Force facility" and "any [Air Force] member . . . in uniform or . . . in a foreign country" from soliciting signatures on a petition without first obtaining authorization from the appropriate commander. *Ibid.*[1] They also provide that "[n]o member

[1] Air Force Reg. 30–1 (9) (1971) provides:

"Right of Petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However,

of the Air Force will distribute or post any printed or written material . . . within any Air Force installation without permission of the commander. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). The commander can deny permission only if he determines that distribution of the material would result in "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission. . . ." *Id.*, 35–15 (3)(a)(2).[2]

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the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander." This regulation has been superseded by Air Force Reg. 30–1 (19)(b) (1977), which contains substantially the same provisions.

[2] Air Force Reg. 35–15 (3)(a) (1970) provides:

"(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee. A copy of the material with a proposed plan or method of distribution or posting will be submitted when permission is requested. Distribution of publications and other materials through the United States mail or through official outlets, such as military libraries and exchanges, may not be prohibited under this regulation.

"(2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances.

"(3) Mere possession of materials unauthorized for distribution or posting may not be prohibited unless otherwise unlawful. However, such material may be impounded if a member of the Armed Forces distributes or posts or attempts to distribute or post such material within the installation. Impounded materials will be returned to the owner when departing the installation unless determined to be evidence of a crime.

"(4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials.

"(5) In general, installation commanders should encourage and promote

Albert Glines was a captain in the Air Force Reserves. While on active duty at the Travis Air Force Base in California, he drafted petitions to several Members of Congress and to the Secretary of Defense complaining about the Air Force's grooming standards.[3] Aware that he needed command approval in order to solicit signatures within a base, Glines at first circulated the petitions outside his base. During a routine training flight through the Anderson Air Force Base in Guam, however, Glines gave the petitions to an Air Force sergeant without seeking approval from the base commander. The sergeant gathered eight signatures before military authorities halted the unauthorized distribution. Glines' commander promptly removed him from active duty, determined that he had failed to meet the professional standards expected of an officer, and reassigned him to the standby reserves. Glines then brought suit in the United States District Court for the Northern District of California claiming that the Air Force regulations requiring prior approval for the circulation of petitions violated the First Amendment and 10 U. S. C. § 1034.[4] The court granted Glines' motion for

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the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues."

[3] The petition to the Secretary of Defense, for example, read:

"Dear Secretary of Defense:

"We, the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

"We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

"We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope that one of our elected or appointed officials will help correct this problem." *Glines* v. *Wade*, 586 F. 2d 675, 677, n. 1 (CA9 1978).

[4] Glines named as defendants three of his superior officers, the Secretary of the Air Force, and the Secretary of Defense.

summary judgment and declared the regulations facially invalid. *Glines* v. *Wade*, 401 F. Supp. 127 (1975).[5]

The Court of Appeals for the Ninth Circuit affirmed the finding of facial invalidity. *Glines* v. *Wade*, 586 F. 2d 675 (1978).[6] Following its decision in an earlier case involving collective petitions to Members of Congress, the court first determined that the regulations violated 10 U. S. C. § 1034.[7] The statute prohibits any person from restricting a serviceman's communication with Congress "unless the communication is unlawful or violates a regulation necessary to the security of the United States." The Air Force regulations against unauthorized petitioning on any base did not satisfy the statutory standard, the court concluded, because the Government had not shown that such restraints on servicemen in Guam were necessary to the national security. 586 F. 2d, at 679. Since § 1034 did not cover Glines' petition to the Secretary of Defense, the court next considered whether the regulations violated the First Amendment. The court acknowledged that requirements of military discipline could justify otherwise impermissible restrictions on speech. It held, however, that

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[5] The District Court also awarded Glines backpay and ordered him restored to active service. 401 F. Supp., at 132. The Court of Appeals affirmed the reinstatement order, but it vacated the backpay award on the ground that all monetary claims against the United States for more than $10,000 are within the exclusive jurisdiction of the Court of Claims. 586 F. 2d, at 681–682. Neither issue is before this Court.

[6] The Court of Appeals held that Glines was not required to exhaust his administrative remedies by seeking relief from the Air Force Board for the Correction of Military Records. The court found that Glines' claim involved statutory and constitutional matters over which the Board had no jurisdiction. *Id.*, at 678. Since the petitioners expressly declined to raise the exhaustion issue in this Court, Pet. for Cert. 6, n. 2, error in the Court of Appeals' resolution of the issue would not affect our jurisdiction. Cf. *Mathews* v. *Eldridge*, 424 U. S. 319, 330 (1976).

[7] The Court of Appeals' decision and the discussion of this issue appear in its opinion in *Allen* v. *Monger*, 583 F. 2d 438, 440–442 (1978), cert. pending *sub nom. Brown* v. *Allen*, No. 78–1005.

the Air Force regulations are unconstitutionally overbroad because they might allow commanders to suppress "virtually all controversial written material." 586 F. 2d, at 681. Such restrictions the court concluded, "exceed anything essential to the government's interests." *Ibid.* We granted certiorari, 440 U. S. 957 (1979), and we now reverse.

II

In *Greer* v. *Spock*, 424 U. S. 828, 840 (1976), MR. JUSTICE STEWART wrote for the Court that "nothing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." In that case, civilians who wished to distribute political literature on a military base challenged an Army regulation substantially identical to the Air Force regulations now at issue. See *id.*, at 831, and n. 2. The civilians claimed that the Army regulation was an unconstitutional prior restraint on speech, invalid on its face. We disagreed. We recognized that a base commander may prevent the circulation of material that he determines to be a clear threat to the readiness of his troops. See *id.*, at 837–839. We therefore sustained the Army regulation. *Id.*, at 840.[8] For the same reasons, we now uphold the Air Force regulations.[9]

[8] We specifically emphasized that the Army regulation at issue in *Greer* v. *Spock* did "not authorize the [base] authorities to prohibit the distribution of conventional political campaign literature." 424 U. S., at 831, n. 2, 840. Thus, our decision to sustain that regulation was distinct from our concomitant decision to uphold another regulation that prevented civilians from using a military base as a forum for the expression of political views, *id.*, at 838–839. See *id.*, at 841 (BURGER, C. J., concurring); *id.*, at 848–849 (POWELL, J., concurring).

[9] MR. JUSTICE STEVENS' dissenting opinion seems to suggest that we should avoid the constitutional issue in this case by applying 10 U. S. C. § 1034 to petitioning activity that the statute otherwise would not protect. *Post*, at 378. Since Glines' petition to the Secretary of Defense was not covered by the statute, however, we agree with the Court of

These regulations, like the Army regulation in *Spock*, protect a substantial Government interest unrelated to the suppression of free expression. See *Procunier* v. *Martinez*, 416 U. S. 396, 413 (1974). The military is, "by necessity, a specialized society separate from civilian society." *Parker* v. *Levy*, 417 U. S. 733, 743 (1974). Military personnel must be ready to perform their duty whenever the occasion arises. *Ibid.* To ensure that they always are capable of performing their mission promptly and reliably, the military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U. S. 738, 757 (1975); see *Department of Air Force* v. *Rose*, 425 U. S. 352, 367–368 (1976).

" 'Speech that is protected in the civil population may . . . undermine the effectiveness of response to command.' " *Parker* v. *Levy*, *supra*, at 759, quoting *United States* v. *Priest*, 21 U. S. C. M. A. 564, 570, 45 C. M. R. 338, 344 (1972). Thus, while members of the military services are entitled to the protections of the First Amendment, "the different character of the military community and of the military mission requires a different application of those protections." *Parker* v. *Levy*, 417 U. S., at 758. The rights of military men must yield somewhat " 'to meet certain overriding demands of discipline and duty. . . .' " *Id.*, at 744, quoting *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion).[10] Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base. *Spock*,

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Appeals that "[t]his petition requires us to decide whether the First Amendment also protects Glines' activities." 586 F. 2d, at 679. As the Court of Appeals understood, Glines' petition to the Secretary was itself a sufficient reason for his reassignment to the standby reserves.

[10] See Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 935–936 (1936); Terrell, Petitioning Activities on Military Bases: The First Amendment Battle Rages Again, 28 Emory L. J. 3, 5–14 (1979).

424 U. S., at 840; *id.*, at 841 (BURGER, C. J., concurring); *id.*, at 848 (POWELL, J., concurring).

Like the Army regulation that we upheld in *Spock*, the Air Force regulations restrict speech no more than is reasonably necessary to protect the substantial governmental interest. See *Procunier* v. *Martinez*, *supra*. Both the Army and the Air Force regulations implement the policy set forth in Department of Defense (DOD) Directive 1325.6 (1969).[11] That directive advises commanders to preserve servicemen's "right of expression . . . to the maximum extent possible, consistent with good order and discipline and the national security." *Id.*, ¶ II. Thus, the regulations in both services prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale. Air Force Reg. 35–15 (3)(a)(2) (1970); Army Reg. 210–10, ¶ 5–5 (c) (1970); see DOD Dir. 1325.6, ¶ III (A)(1) (1969). Indeed, the Air Force regulations specifically prevent commanders from halting the distribution of materials that merely criticize the Government or its policies. Air Force Reg. 35–15 (3)(a)(4) (1970); see DOD Dir. 1325.6, ¶ III (A)(3) (1969). Under the regulations, Air Force commanders have no authority whatever to prohibit the distribution of magazines and newspapers through regular outlets such as the post exchange newsstands. Air Force Reg. 35–15 (3)(a)(1) (1970); see DOD Dir. 1325.6, ¶ III (A)(1) (1969).[12] Nor may they interfere with the "[d]istribution of publications and other materials through

[11] The Navy regulations adopted pursuant to DOD Dir. 1325.6 are at issue in *Secretary of Navy* v. *Huff*, *post*, p. 453, which we also decide today.

[12] The Army regulations allowed a commander to delay, and the Department of the Army to prevent, the distribution within a military base of particular issues of a commercial publication. Army Reg. 210–10, ¶¶ 5–5 (c), (d) (1970). That part of the Army regulations was not at issue in *Greer* v. *Spock*. See 424 U. S., at 832, n. 2. The Air Force regulations contain no such provision.

the United States mail. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). The Air Force regulations also require any commander who prevents the circulation of materials within his base to notify his superiors of that decision. Air Force Reg. 35–15 (3)(a)(2) (1970); see Army Reg. 210–10, ¶ 5–5 (d) (1970). *Spock* held that such limited restrictions on speech within a military base do not violate the First Amendment. 424 U. S., at 840; *id.*, at 848 (POWELL, J., concurring).

Spock also established that a regulation requiring members of the military services to secure command approval before circulating written materials within a military base is not invalid on its face. *Id.*, at 840.[13] Without the opportunity to review materials before they are dispersed throughout his base, a military commander could not avert possible disruptions among his troops. Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force.[14] "[T]he accuracy and effect of a superior's command

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[13] Glines would distinguish *Spock* on the ground that the plaintiffs in that case were civilians who had no specific right to enter a military base. The distinction is unpersuasive. Our decision in *Spock* rejected a facial challenge to a regulation that required "any person," civilian or military, to obtain prior permission for the distribution of literature within a base. *Id.*, at 831. Unauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians. Furthermore, the military has greater authority over a serviceman than over a civilian. See *Parker* v. *Levy*, 417 U. S. 733, 749–751 (1974). Even when not confronted with the special requirements of the military, we have held that a governmental employer may subject its employees to such special restrictions on free expression as are reasonably necessary to promote effective government. See *CSC* v. *Letter Carriers*, 413 U. S. 548, 565 (1973); *Cole* v. *Richardson*, 405 U. S. 676, 684 (1972); cf. *Kelley* v. *Johnson*, 425 U. S. 238, 245–248 (1976).

[14] The special dangers present in certain military situations may warrant different restrictions on the rights of servicemen. But those restrictions necessary for the inculcation and maintenance of basic discipline and pre-

depends critically upon the specific and customary reliability of [his] subordinates, just as the instinctive obedience of subordinates depends upon the unquestioned specific and customary reliability of the superior." *Department of Air Force* v. *Rose*, 425 U. S., at 368. Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline. See, *e. g.*, *Schlesinger* v. *Councilman*, 420 U. S. 738 (1975); *Parker* v. *Levy*, 417 U. S. 733 (1974); *Burns* v. *Wilson*, 346 U. S. 137 (1953); *Orloff* v. *Willoughby*, 345 U. S. 83 (1953); *In re Grimley*, 137 U. S. 147 (1890). In *Spock*, we found no facial constitutional infirmity in regulations that allow a commander to determine before distribution whether particular materials pose a clear danger to the good order of his troops.[15]

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paredness are as justified on a regular base in the United States, *Schneider* v. *Laird*, 453 F. 2d 345 (CA10) (*per curiam*), cert. denied, 407 U. S. 914 (1972); *Dash* v. *Commanding General*, 307 F. Supp. 849 (SC 1969), aff'd, 429 F. 2d 427 (CA4 1970) (*per curiam*), cert. denied, 401 U. S. 981 (1971), as on a training base, *Greer* v. *Spock*, *supra*, or a combat-ready installation in the Pacific, *Carlson* v. *Schlesinger*, 167 U. S. App. D. C. 325, 511 F. 2d 1327 (1975). Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them. And members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster. Since the prior approval requirement supports commanders' authority to maintain basic discipline required at nearly every military installation, it does not offend the First Amendment. "This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there [are] a substantial number of situations to which it might be validly applied." *Parker* v. *Levy*, *supra*, at 760.

[15] Commanders sometimes may apply these regulations "irrationally, invidiously, or arbitrarily," thus giving rise to legitimate claims under the First Amendment. *Greer* v. *Spock*, *supra*, at 840; see *Secretary of Navy* v. *Huff*, *post*, at 457–458, n. 5. But Glines, who—like the civilians in *Spock*—never requested permission to circulate his materials, has not and cannot raise such a claim. *Greer* v. *Spock*, 424 U. S., at 840; *id.*, at 849 (POWELL, J., concurring).

The Air Force regulations at issue here are identical in purpose and effect to the regulation that we upheld in *Spock*. We therefore conclude that they do not violate the First Amendment.

III

The only novel question in this case is whether 10 U. S. C. § 1034 bars military regulations that require prior command approval for the circulation within a military base of petitions to Members of Congress. The statute says that "[n]o person may restrict *any member* of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." (Emphasis added.) Glines contends that this law protects the circulation of his collective petitions as well as the forwarding of individual communications. We find his contention unpersuasive.

Section 1034 was introduced as a floor amendment to the Universal Military Training and Service Act of 1951 in response to a specific and limited problem. While Congress was debating the Act, Congressman Byrnes of Wisconsin learned that a young constituent seeking a hardship discharge from the Navy "had been told by his commanding officer . . . that a direct communication with his Congressman was prohibited and [that] it would make him subject to court-martial." 97 Cong. Rec. 3776 (1951). When the Congressman made inquiry about the regulations imposing this restriction, the Secretary of the Navy informed him that they required "any letter from a member of the naval service . . . to a Congressman which affects the Naval Establishment . . . [to] be sent through official channels." *Ibid.*[16] The Con-

[16] The relevant Navy regulation actually imposed restrictions on "[a]ll petitions, remonstrances, memorials and communications of any person or persons in the naval service. . . ." Navy Regs., art. 1248 (1948). Glines argues that Congress intended to remove all restrictions imposed by the regulation, including those on collective as well as individual petition-

gressman then proposed an amendment to the pending military legislation that would outlaw this requirement.

Congressman Byrnes' purpose was "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." *Ibid.*[17] The entire legislative history of the measure focuses on providing an avenue for the communication of individual grievances. The Chairman of the Armed Services Committee succinctly summarized the legislative understanding. The amendment, he said, was intended "to let every man in the armed services have the privilege of writing his Congressman or Senator on any subject if it does not violate the law or if it does not deal with some secret matter." *Id.*, at 3877. It therefore is clear that Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels.[18]

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ing. But the plain language of § 1034 reflects no such intention. Indeed, nothing in the legislative history suggests that Congress even was aware of the full scope of the Navy regulation.

[17] The original proposal protected any person from induction into a branch of the Armed Forces that restricted the "rights of its members to communicate directly with Members of Congress. . . ." 97 Cong. Rec. 3776 (1951). After the Chairman of the Armed Services Committee pointed out that the Navy did not induct its members, *ibid.*, the proposal was amended to substantially its present form, *id.*, at 3877, 3883. Universal Military Training and Service Act of 1951, § 1 (d), 65 Stat. 78. The statute underwent minor revisions when codified in 1956. Act of Aug. 10, 1956, 70A Stat. 80. No change in substance was intended. See S. Rep. No. 2484, 84th Cong., 2d Sess., 19–21, 95–96 (1956); H. R. Rep. No. 970, 84th Cong., 1st Sess., 8–10, 85 (1955).

[18] Section 1034 stands in marked contrast to an analogous statute enacted about 40 years earlier in order to guarantee federal civil servants the right to petition Congress. That statute provides: "The right of employees, *individually or collectively*, to petition Congress or a Member of Congress, or to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied." 5 U. S. C. § 7211 (1976 ed., Supp. II). (Emphasis added.)

Both Congress and this Court have found that the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale. See, *e. g.*, *Middendorf* v. *Henry*, 425 U. S. 25, 37–40, 43 (1976); *id.*, at 49–51 (POWELL, J., concurring); *Parker* v. *Levy*, 417 U. S., at 756; *Orloff* v. *Willoughby*, 345 U. S., at 93–94.[19] In construing a statute that touches on such matters, therefore, courts must be careful not to "circumscribe the authority of military commanders to an extent never intended by Congress." *Huff* v. *Secretary of Navy*, 188 U. S. App. D. C. 26, 35, 575 F. 2d 907, 916 (1978) (Tamm, J., concurring in part and dissenting in part), rev'd, *post*, p. 453. Permitting an individual member of the Armed Services to submit a petition directly to any Member of Congress serves the legislative purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. The unrestricted circulation of collective petitions could imperil discipline. We find no legislative purpose that requires the military to assume this risk and no indication that Congress contemplated such a result.[20] We therefore decide

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[19] See also *Curry* v. *Secretary of Army*, 194 U. S. App. D. C. 66, 595 F. 2d 873 (1979).

[20] Glines says DOD Dir. 1325.6, ¶ III (G) (1969), shows that the Department of Defense itself construes the statute more broadly. The directive, however, adds nothing to the statutory language or the legislative history. It simply says that the Uniform Code of Military Justice, Art. 138, 10 U. S. C. § 938, protects the "right of members [of the Armed Forces] to complain and request redress of grievances against actions of their commander." It then cites 10 U. S. C. § 1034 for the statement that "a member may petition or present any grievance to any member of Congress. . . ." In *Huff* v. *Secretary of Navy*, 188 U. S. App. D. C. 26, 32, 575 F. 2d 907, 913 (1978), rev'd, *post*, p. 453, the court concluded that this reference to § 1034 implied approval of group petitioning. But the regulations enforced in the Air Force and the other services demonstrate that the Department of Defense has construed its own directive otherwise. See *supra*, at 355–356, and n. 11.

that § 1034 does not protect the circulation of collective petitions within a military base.

IV

We conclude that neither the First Amendment nor 10 U. S. C. § 1034 prevents the Air Force from requiring members of the service to secure approval from the base commander before distributing petitions within a military base. We therefore hold that the regulations at issue in this case are not invalid on their face. Accordingly, the judgment of the Court of Appeals is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BRENNAN, dissenting.*

I join my Brother STEWART's dissent on statutory grounds in Nos. 78–599 and 78–1006. Since that opinion does not command a Court, it is appropriate to express my view on the constitutional questions presented. I believe that the military regulations at issue are prohibited by the First Amendment; accordingly, I would hold them to be unconstitutional, and affirm the judgments of the two Courts of Appeals.

Two sets of military regulations are challenged. Respondents in *Huff* (No. 78–599), *post*, p. 453, attack Navy and Marine Corps regulations that require prior approval by commanding officers before the origination, distribution, or circulation of petitions or other written material on ships, aircraft, military installations, and "anywhere within a foreign country." Fleet Marine Force Pacific Order 5370.3 (1974). Respondent in *Glines* (No. 78–1006) challenges parallel Air Force regulations that require command approval before the

*[This opinion applies also to No. 78–599, *Secretary of Navy et al.* v. *Huff et al.*, *post*, p. 453.]

distribution or posting of nonofficial printed material and for the circulation of petitions for signature.[1] Air Force Regs. 30–1 (9) (1971) and 35–15 (3)(a) (1970). Both the Navy and Marine Corps and the Air Force regulations authorize withholding of approval if the commander determines that distribution would pose a "clear danger" to loyalty, discipline, or morale of servicemen or if the distribution would "[m]aterially interfere" with military duties.[2] The Air Force regulations explicitly declare, however, that "[d]istribution or posting may not be prohibited *solely* on the ground that the material is critical of Government policies or officials." Air Force Reg. 35–15 (3)(a)(4). (Emphasis added.)[3]

I

Respondents contend that the regulations impermissibly interfere with First Amendment rights to communicate and petition. That contention finds solid support in First Amendment doctrine as explicated in a variety of settings by decisions of this Court. These regulations plainly establish an essentially discretionary regime of censorship that arbitrarily deprives respondents of precious communicative rights.

The circulation of petitions is indisputably protected First Amendment activity. Petitioning involves a bundle of related First Amendment rights: the right to express ideas, see, *e. g.*,

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[1] The Air Force regulations exempt from prior command approval the distribution of published material "through the United States mail or through official outlets, such as military libraries and exchanges. . . ." Air Force Reg. 35–15 (3)(a)(1) (1970). Department of Defense guidelines are to the same effect. DOD Directive 1325.6 (1969).

[2] In addition, the Navy and Marine Corps regulations bar circulation of material that advocates insubordination, disloyalty, mutiny, or desertion, that discloses classified information, that contains obscene matter, or that involves the planning of unlawful acts.

[3] A counterpart to this declaration is the statement in DOD Directive 1325.6, ¶ III (A)(3) (1969), that "[t]he fact that a publication is critical of Government policies or officials is not, in itself, a ground upon which distribution may be prohibited."

Street v. *New York*, 394 U. S. 576, 593 (1969); *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943), the right to be exposed to ideas expressed by others, see, *e. g.*, *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *id.*, at 308 (BRENNAN, J., concurring); *Martin* v. *City of Struthers*, *supra*, at 143, the right to communicate with government, see, *e. g.*, *Edwards* v. *South Carolina*, 372 U. S. 229, 235 (1963); cf. *Hague* v. *CIO*, 307 U. S. 496, 513 (1939) (Roberts, J.), and the right to associate with others in the expression of opinion, see, *e. g.*, *Buckley* v. *Valeo*, 424 U. S. 1, 15 (1976); *Healy* v. *James*, 408 U. S. 169, 181 (1972); *NAACP* v. *Alabama*, 357 U. S. 449, 460 (1958).[4] The petition is especially suited for the exercise of all of these rights: It serves as a vehicle of communication; as a classic means of individual affiliation with ideas or opinions; and as a peaceful yet effective method of amplifying the views of the individual signers. Indeed, the petition is a traditionally favored method of political expression and participation. See, *e. g.*, *United States* v. *Cruikshank*, 92 U. S. 542, 552–553 (1876); 2 J. Story, Commentaries on the Constitution of the United States 619–620 (Cooley ed., 1873); cf. *White* v. *Nicholls*, 3 How. 266, 289 (1845). Thus, petitioning of officials has been expressly held to be a right secured by the First Amendment.[5] *Bridges* v. *California*, 314 U. S. 252, 277 (1941).

This First Amendment shield for petitioning is impermissibly breached in at least three ways by the regulations before us.

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[4] It may be that the Petition Clause, in some contexts, enhances the protections of the Speech Clause. There is no need, however, to explore the distinctive attributes of the Petition Clause in these cases, for conventional First Amendment analysis amply suffices to dispose of the constitutional issues presented here.

[5] Because the petition so effectively promotes a number of First Amendment interests—especially those that are associational in nature—petitioning is not merely fungible with other expressive activities.

First. By mandating that proposed petitions be subjected to command approval, the regulations impose a prior restraint.[6] See *Greer* v. *Spock*, 424 U. S. 828, 865 (1976) (BRENNAN, J., dissenting); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U. S. 546, 552–553 (1975); *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 45–46 (1961). Although the First Amendment bar against prior restraints is not absolute, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 590 (1976) (BRENNAN, J., concurring in judgment), the Court has repeatedly emphasized that the prior censorship of expression can be justified only by the most compelling governmental interests, see, *e. g.*, *Nebraska Press Assn.* v. *Stuart*, *supra*, at 558–559; *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971) (*per curiam* opinion); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697, 715–716 (1931). Thus far, only the interest in averting a virtually certain prospect of imminent, severe injury to the Nation in time of war has been generally considered a sufficiently weighty ground for prior restraint of constitutionally protected speech.[7] See, *e. g.*, *New York*

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[6] The command-approval requirement is not simply a "time, place, and manner" regulation valid under the First Amendment. See *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 98 (1972). The constitutional touchstone of permissible time, place, and manner regulation is that it focus upon the circumstances—not the content of expression. *Id.*, at 99. The military regulations in these cases—facially and as applied—look to the content of petitions, as well as to the manner in which they are circulated.

[7] To be sure, we have upheld restraints directed against obscenity, *Times Film Corp.* v. *Chicago*, 365 U. S. 43, 47–48 (1961), or against so-called "fighting words," *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942). Such restraints have been permitted on the theory that the censored expression does not enjoy First Amendment protection. We have always been careful to insist, however, that restrictions aimed at unprotected speech be carefully crafted and applied to avoid trenching upon

Times, 403 U. S., at 726–727 (BRENNAN, J., concurring); *id.*, at 730 (STEWART, J., concurring). The instant regulations, however, explicitly require commanding officers to suppress petitioning for reasons far less urgent than imminent, serious, peril to the United States or its citizens. The maintenance of military discipline, morale, and efficiency are undeniably important, but they are not always, and in every situation, to be regarded as more compelling than a host of other governmental interests which we have found insufficient to warrant censorship. See, *e. g.*, *New York Times Co.* v. *United States*, *supra*; *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969); see also *Buckley* v. *Valeo*, *supra*. Moreover, terms as amorphous as "discipline" and "morale" invite latitudinous interpretation that intolerably disadvantages the exercise of First Amendment rights. See *Procunier* v. *Martinez*, 416 U. S. 396, 415–416 (1974). As these very cases illustrate, the perceived threat to discipline and morale will often correlate with the commanding officer's personal or political biases.[8] See *infra*, at 372–373.

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communication that comes within the ambit of the First Amendment. See, *e. g.*, *Freedman* v. *Maryland*, 380 U. S. 51 (1965).

It has also been speculated that the direct, immediate threat of interference with the trial process might warrant a restraint upon constitutionally protected expression. *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 569–570 (1976) (dictum). But see *id.*, at 588, 594–595 (BRENNAN, J., concurring in judgment). Significantly, however, this Court has repeatedly rejected efforts to wield the judicial contempt power against expression that assertedly jeopardized the administration of justice. See *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 844–845 (1978); *Wood* v. *Georgia*, 370 U. S. 375 (1962); *Craig* v. *Harney*, 331 U. S. 367 (1947); *Pennekamp* v. *Florida*, 328 U. S. 331 (1946); *Bridges* v. *California*, 314 U. S. 252 (1941).

[8] Among the suppressed communications were a petition to a Congressman supporting amnesty for Vietnam War resisters and a leaflet outlining certain respondents' views about the constitutional rights of servicemen. Both were censored, the former because it "contain[ed] gross misstatements and implications of law and fact [and] impugn[ed] by innuendo the

Second. The command-approval procedure implementing these regulations is seriously flawed. Time and again, the Court has underscored the principle that restraints upon communication must be hedged about by procedures that guarantee against infringement of protected expression and that eliminate the play of discretion that epitomizes arbitrary censorship. See, *e. g., Southeastern Promotions, Ltd.* v. *Conrad, supra,* at 558–562; *Blount* v. *Rizzi,* 400 U. S. 410, 416–417 (1971); *Carroll* v. *President & Comm'rs of Princess Anne,* 393 U. S. 175, 181 (1968); *Freedman* v. *Maryland,* 380 U. S. 51 (1965); *Bantam Books, Inc.* v. *Sullivan, supra,* at 70–71; cf. *Schneider* v. *New Jersey,* 308 U. S. 147 (1939). We have identified specific safeguards that are indispensable if a system of prior approval is to avoid First Amendment pitfalls. These include (1) the requirement that the burden of justifying censorship fall upon the censor, see *New York Times Co.* v. *United States, supra,* at 714; *Freedman* v. *Maryland, supra,* at 58, (2) the condition that administrative suppression must be subject to speedy judicial review, see *Blount* v. *Rizzi, supra,* at 417, and (3) the rule that those whose First Amendment interests are at stake be given notice and an opportunity to be heard during suppression proceedings, see *Carroll* v. *President & Comm'rs of Princess Anne, supra,* at 181–183; cf. *Procunier* v. *Martinez, supra,* at 417–419.

None of these safeguards is present under the prior command-approval scheme. There is no indication that the burden of justifying censorship rests upon the authorities. Not only does the commanding officer make his own determination to suppress, but also no provision is made for prompt judi-

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motives and conduct of the Commander-in-Chief of the Armed Forces"; the latter because it was "by transparent implication, disrespectful and contemptuous of all of your superiors. . . ." App. in No. 78–599, pp. 46–47, 50. The petitioners conceded below that suppression of the leaflet was improper under military regulations. Brief for Petitioners in No. 78–599, p. 8, n. 3.

cial review.[9] And we search the regulations in vain for any provision affording the right to appear before the censoring officer to argue for approval. Thus, the regulations utterly fail to meet even the minimum procedural dictates of the First Amendment; rather, as designed, they countenance the arbitrary and nonneutral suppression of communication by petition.[10]

Third. The regulations demonstrably do not serve the military interests offered as their compelling justification, and for that reason alone violate the First Amendment. If regulation of communicative rights is to be justified by a compelling governmental interest, the regulation must *precisely* further that interest; where constitutional rights are at stake, important ends do not sustain mismatched means. See *Nebraska Press Assn.* v. *Stuart*, 427 U. S., at 563–567, 569; *Procunier* v. *Martinez, supra*, at 413. In this respect, the regulations here plainly founder. The most important purpose that can be posited for them is prevention of incitement to military disorder. But if the danger of incitement necessitates prior clearance of servicemen's messages, it would be logical for the military to mandate preclearance of all messages, whether

[9] It is unnecessary to consider whether servicemen might challenge censorship decisions by bringing suits against their commanding officers. See *Huff, post*, at 457–458, n. 5. The lack of provision for immediate judicial review is not cured by the possibility that an individual might assume the burden of commencing a collateral action. Cf. *Blount* v. *Rizzi*, 400 U. S. 410, 418 (1971). Moreover, it is unlikely as a practical matter that persons serving at sea or on foreign soil will have ready access to domestic federal courts.

[10] Again, the factual background of these cases is instructive. Two respondents individually submitted a single leaflet for approval. The commanding general denied one respondent permission to distribute the leaflet on base, because of its disrespectful and "contemptuous" tone. The same officer permitted the other respondent to circulate the identical leaflet outside the main gate. App. in No. 78-599, pp. 36, 50. Since the on-post/off-post distinction had not been considered dispositive with respect to other requests, see *id.*, at 44, 46–47, it is difficult to identify the principle underlying the differing decisions about the leaflet.

circulated by petition or disseminated orally. Since oral discussion is not subjected to preliminary censorship, doubt must be raised as to the urgency and the efficacy of such censorship when communication is by petition. In other words, inasmuch as the content of an oral communication may be identical to the content of a petition, there is no reason to single out petitions for a content-preclearance requirement.

The only rational basis for disparate treatment of petitioning and oral communication would be the presence of some danger *peculiar to the process of petitioning*. But petitioning differs from simple oral expression only in that it involves an element of physical conduct. Insofar as that physical element of the petitioning process poses a greater threat of disruption than does simple verbal expression, recourse to content-neutral regulation of the time, place, and manner of circulation is surely an appropriate and sufficient alternative to suppression. By ordering prior official review of the content of petitions, these regulations are an excessive response to any distinctive problems of petitioning. Even the most important governmental purpose cannot justify a regulation that unduly burdens First Amendment liberties. See *Shelton* v. *Tucker*, 364 U. S. 479, 488–490 (1960).

II

All that the Court offers to palliate these fatal constitutional infirmities is a series of platitudes about the special nature and overwhelming importance of military necessity.[11] *Ante*, at 353–354.

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[11] The Court, *ante*, at 356, n. 13, also suggests that curtailment of First Amendment freedoms might be warranted inasmuch as service personnel are Government employees, citing *CSC* v. *Letter Carriers*, 413 U. S. 548 (1973). That doctrine is inapposite. The predicate for upholding liberty restrictions as a condition of public employment must, at least in part, be the voluntariness of the decision to accept Government employment. At various times, however, this country has inducted citizens into military service as a matter of compulsion. Moreover, unlike other employees,

Military (or national) security is a weighty interest, not least of all because national survival is an indispensable condition of national liberties. See *United States* v. *Robel*, 389 U. S. 258, 264 (1967). But the concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights.

Such skepticism lay at the heart of our decision in *New York Times Co.* v. *United States*. There, the Government urged that publication of the so-called Pentagon Papers would damage the Nation's security during a period of armed conflict. We rejected that assertion. 403 U. S., at 714. Separate opinions scrutinized the security argument, and declined to rely merely upon the Government's characterization of the interest at stake. *Id.*, at 719–720 (Black, J.); *id.*, at 722–724 (Douglas, J.); *id.*, at 726–727 (BRENNAN, J.); *id.*, at 730 (STEWART, J.); *id.*, at 731, 733 (WHITE, J.). Similarly, *United States* v. *Robel*, *supra*, at 263–264, spurned simple deference to "talismanic incantation[s]" of "'war power.'" Analogously, we have stringently viewed the national-security argument when it has been proffered to support domestic warrantless surveillance. *United States* v. *United States District Court*, 407 U. S. 297, 320 (1972).

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servicemen may not freely resign their posts should they decide to unburden themselves of restraints upon their freedom of expression.

It is also noteworthy that the statutory scheme considered in *Letter Carriers* permitted employees to "[s]ign a political petition as an individual," 413 U. S., at 577, n. 21, and evidently further allowed the full panoply of petitioning rights with respect to petitions addressed to the Federal Government, *id.*, at 572–574, 587–588 (appendix).

To be sure, generals and admirals, not federal judges, are expert about military needs. But it is equally true that judges, not military officers, possess the competence and authority to interpret and apply the First Amendment. Moreover, in the context of this case, the expertise of military officials is, to a great degree, tainted by the natural self-interest that inevitably influences their exercise of the power to control expression. Partiality must be expected when government authorities censor the views of subordinates, especially if those views are critical of the censors. Larger, but vaguely defined, interests in discipline or military efficiency may all too easily become identified with officials' personal or bureaucratic preferences. This Court abdicates its responsibility to safeguard free expression when it reflexively bows before the shibboleth of military necessity. Cf. *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829, 842–845 (1978).

A properly detached—rather than unduly acquiescent—approach to the military-necessity argument here would doubtless have led the Court to a different result. The military's omission to regulate the content of oral communication suggests the pointlessness of controlling the identical message when embodied in a petition. It is further troubling that these regulations apply to all military bases, not merely to those that operate under combat or near-combat conditions. The "front line" and the rear echelon may be difficult to identify in the conditions of modern warfare, but there is a difference between an encampment that faces imminent conflict and a military installation that provides staging, support, or training services. It is simply impossible to credit the contention that national security is significantly promoted by the control of petitioning throughout *all* installations.

Finally, and fundamentally, the Court has been deluded into unquestioning acceptance of the very flawed assumption that discipline and morale are enhanced by restricting peaceful communication of various viewpoints. Properly regulated as

to time, place, and manner, petitioning provides a useful outlet for airing complaints and opinions that are held as strongly by citizens in uniform as by the rest of society. The forced absence of peaceful expression only creates the illusion of good order; underlying dissension remains to flow into the more dangerous channels of incitement and disobedience. In that sense, military efficiency is only disserved when First Amendment rights are devalued.

III

The Court egregiously errs in holding that *Greer* v. *Spock*, 424 U. S. 828 (1976), compels the validation of these regulations. I dissented in *Greer*, and continue to disagree with the decision in that case. But, in any event, *Greer* is not dispositive here; indeed, if it governs at all in these cases, *Greer* is authority that the regulations are constitutionally indefensible.

Greer arose because of the rejection by military authorities of Dr. Benjamin Spock's request to hold a Presidential campaign meeting and distribute campaign literature at Fort Dix. Although the case involved a number of Army regulations restricting various expressive activities—including regulations parallel to those before us now—the actual issue in *Greer* was the exclusion of a politically partisan campaign effort. And there were three critical elements in *Greer* that prompted the Court to sustain that exclusion:

First, the Court relied upon the proposition that civilians lack expressive rights on military reservations from which they can be excluded. Significantly, the previous decision in *Flower* v. *United States*, 407 U. S. 197 (1972) (*per curiam*), was distinguished on the ground that leafletting in *Flower* had taken place on a portion of Fort Sam Houston that had been effectively dedicated to public use.

Second, the Court noted that servicemen stationed at Fort Dix had easy access to off-base public fora where they could be exposed to communications by Dr. Spock and others. By the

same token, although not discussed in *Greer*, these off-base fora provided Dr. Spock with ample opportunity for expressive activity. Thus, from the standpoint of speaker and listeners, the Fort Dix regulations only effected a partial cutoff of communicative rights because other equivalent avenues of interchange remained open.

Finally, *Greer* repeatedly emphasized the lack of *any* claim that the Fort Dix regulations had been applied in biased fashion. It explicitly noted the complete absence of any question of "irrationa[l], invidiou[s], or arbitrar[y]" application of the Army regulations. 424 U. S., at 840. Accordingly, the Court did not confront the problem of official discrimination among political viewpoints. Indeed, *Greer* placed weight upon a perceived "American constitutional tradition" that the military be institutionally free of political entanglement, and that it avoid "the appearance of acting as a handmaiden for partisan political causes or candidates." *Id.*, at 839.

These three predicates to *Greer* are wholly absent in the setting in which we review the regulations before us. On their face, and as applied in these cases, the regulations restrict the expressive activities of individuals who are mandatorily, not permissively, present on military reservations. For soldiers and sailors, as opposed to civilians, military installations *must be* the place for "free . . . communication of thoughts," *Greer* v. *Spock*, *supra*, at 838. Further, when service personnel are stationed abroad or at sea, the base or warship is very likely the *only* place for free communication of thoughts.[12] Thus, in contrast to *Greer*, the regulations here permit complete foreclosure of a distinctive mode of expression by servicemen, who lack the civilian's option to depart the sphere of military authority.

These cases also differ from *Greer* because they exemplify

[12] The regulations permit commanding officers to restrain petitioning activities off-base in foreign countries.

pervasive official partiality in the regulation of messages.[13] The orders refusing command approval for respondents' petitioning or leafletting flowed from the obviously biased official judgment that the content was "erroneous and misleading commentary," App. in No. 78–599, p. 34, or that it "impugn[ed] by innuendo the motives and conduct" of the President, *id.*, at 46. Far from being evenhanded regulation, this sort of command judgment is quintessentially political; in suppressing communication that "impugns" Presidential conduct "by innuendo," military authorities entangle themselves in national politics. Since these cases involve discriminatory regulation of communication, *Greer*'s assumption of military neutrality—and, consequently, *Greer*'s result—cannot govern here. Actually, the "tradition of a politically neutral military," *Greer, supra,* at 839, strongly counsels invalidation of these regulations, which demonstrably encourage commanding officers to exercise personal political judgment in deciding whether to permit petitioning.[14]

Today's decisions, then, clash, rather than comport, with the underlying premises of *Greer* v. *Spock*. The Court unnecessarily trammels important First Amendment rights by uncritically accepting the dubious proposition that military security requires—or is furthered by—the discretionary sup-

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[13] While the respondents in these cases mount a facial challenge to the military regulations, an appreciation of the theoretical dangers posed by the regulations is best gained by considering their operation in practice.

[14] Indeed, inasmuch as the regulations state that distribution or posting of petitions or other writings "may not be prohibited *solely* on the ground that the material is critical of Government policies or officials," Air Force Reg. 35–15 (3)(a)(4) (1970) (emphasis added), the implication is that prohibition may be partly based upon the fact that the material in question challenges Government policy or officials.

Further, at least one command response to a petitioning request indicates that the officer in charge considered his censoring function to include the duty to "afford proper guidance to the men under my command," App. in No. 78–599, pp. 46–47.

pression of a classic form of peaceful group expression. Service men and women deserve better than this. I respectfully dissent.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Department of the Navy used to have a regulation mandating that every communication to a Member of Congress from anybody in the Navy had to be forwarded through official channels, if the communication "affect[ed] the Naval Establishment." See 97 Cong. Rec. 3776 (1951). Congress was informed about this regulation in 1951, and its reaction was to enact a statute that currently reads:

> "No person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." 10 U. S. C. § 1034.

Today, the Court holds that this statute does not in any way protect the circulation by servicemen on United States military bases of petitions addressed to Members of Congress. Specifically, the Court holds that the statute does not apply to a military regulation requiring that the content of petitions addressed to Members of Congress be precleared,[1] even when

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[1] On their face, the regulations at issue strongly suggest that the content of prospective petitions may be considered by the commanding officer in determining whether or not to grant servicemen permission to circulate the documents. Air Force Reg. 35-15 (3)(a) (1970) requires that, in order to obtain permission to circulate any petition, a serviceman must submit to his commander "[a] copy of the material with a proposed plan or method of distribution or posting. . . ." The regulation further provides that permission to distribute will be denied where the commander determines that "a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result." Finally, the regulation admonishes the commander that "[d]istribution or posting may not be

the petitioning activity occurs on a base located in a noncombat area in time of peace. To reach this result, the Court necessarily concludes either that petitions are not "communication[s]" within the meaning of § 1034 or that the compelled prescreening of petitions is not a "restrict[ion]" within the meaning of that statute. Since, in my view, each of these conclusions is at odds with the express language of the statute and with its legislative history, I respectfully dissent.

Section 1034 protects those servicemen who "communicat[e]" with Members of Congress. As the Court necessarily acknowledges, a letter bearing one signature is a "communication" protected by § 1034. Nothing in logic would suggest that such a letter forfeits the statute's protection simply by acquiring additional signatures. Accordingly, reason would indicate that petitions are a form of "communication" protected under § 1034: they are no more than letters bearing many signatures. Moreover, it seems clear that a serviceman "communicates' with his Congressman just as much when he signs a letter drafted by a third person as when he writes and signs that letter himself.

Yet the Court's opinion appears to conclude that petitions are not "communications" within the meaning of § 1034. To reach this conclusion, the Court relies on the statute's legislative history. As the Court points out, the specific situation brought to the attention of Congress in 1951 was that of a

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prohibited *solely* on the ground that the material is critical of Government policies or officials." (Emphasis added.)

Any doubt that the regulations involved here permit the appropriate commanding officer to review the contents of prospective petitions is dispelled by what occurred in *Secretary of Navy* v. *Huff*, *post*, p. 453. There, a commanding officer, acting under the authority of similar regulations, prohibited the circulation of petitions because they contained "gross misstatements and implications of law and fact as well as impugning by innuendo the motives and conduct of the Commander-in-Chief of the Armed Forces. . . ."

serviceman who had been threatened with court-martial proceedings if he sent a letter to his Congressman without prior command approval. By enacting the predecessor of § 1034, Congress made clear that it wanted to prohibit this kind of restraint. But the legislative history cited by the Court shows that the purpose of the law was considerably broader than simply "to permit any man who is inducted to sit down and take a pencil and paper and write to his Congressman or Senator." 97 Cong. Rec. 3776 (1951).

The historic matrix of the law contains no suggestion that Congress intended § 1034 to cover no more than a letter written and signed by one individual person.[2] If anything is to be drawn from § 1034's history, it is that Congress intended to protect more than such single-signature letters. A precise and particularized problem was brought to the attention of Congress in 1951, one that could easily have been remedied by a similarly circumscribed solution. Congress chose instead to write broadly so as to accord protection to all "communications" sent by military personnel to Members of Congress. Clearly, the legislative purpose was to cover the myriad of ways in which a citizen may communicate with his Congressman. By limiting the scope of § 1034 to the particular case brought to the attention of Congress in 1951, the Court, I think, reads the legislative history as mistakenly as it reads the language of the statute itself.[3]

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[2] It is worth noting that nothing in § 1034's legislative history indicates that when Congress drafted that provision it had in mind the slightly different wording of 5 U. S. C. § 7211 (1976 ed., Supp. II), which explicitly protects the petitioning rights of federal civil servants.

[3] In support of its conclusion, the Court states: "The unrestricted circulation of collective petitions could imperil discipline. We find no legislative purpose that requires the military to assume this risk and no indication that Congress contemplated such a result." *Ante*, at 360. Contrary to the Court's implication, a reading of § 1034 to include petitions within that statute's ambit would not leave the military without the ability to protect its vital interests. The statute expressly permits the

The Court's opinion can be interpreted alternatively to hold that the regulations at issue do not constitute a "restrict[ion]" within the meaning of § 1034. That position also gives the statute an unjustifiably narrow scope. An absolute ban of petitions or petitioning activity on military bases would obviously constitute a "restrict[ion]."[4] The regulations before us amount to such a ban, but with one difference. They permit a limited exception for petitions whose content has been precleared by command authority. This kind of exception, however, is precisely the type of "restrict[ion]" on the free flow of communication between servicemen and Congress that the law prohibits. As stated by the law's sponsor, a requirement that a serviceman send his communications through channels "is a restriction in and of itself." 97 Cong. Rec. 3776 (1951).

That the preclearance regulations at issue here restrict the free flow of communication between servicemen and Members of Congress could not be more clearly demonstrated than by the facts presented in *Secretary of Navy* v. *Huff*, *post*, p. 453. There, servicemen invoked the preclearance procedures contained in similar regulations, but were denied permission to collect signatures on several petitions addressed to Members of Congress, which denials the Government now concedes were improper.[5] Not only did the prescreening procedure unjustifiably prevent the circulation of those particular petitions; it also necessarily discouraged further collective and individual

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promulgation of rules regulating communicative conduct if "necessary to the security of the United States."

[4] Without some activity aimed at the acquisition of signatures, no petition could ever be created.

[5] Permission was denied to circulate a petition to Senator Cranston opposing the use of military personnel in labor disputes and a petition to Representative Dellums requesting amnesty for Vietnam war resisters, even though the requesters had stated that they would circulate the petitions out of uniform, during their off-duty hours, and away from the work areas of the base.

attempts by those servicemen to communicate with Congress.

It seems clear to me that the application of the challenged regulations in this case violated the provisions of § 1034. Under that statute only those rules that prohibit "unlawful" communications or that are "necessary to the security of the United States" may be enforced. No claim is made here that the communicative content of any of the respondent's petitions was in any way "unlawful." Moreover, no contention is made that the respondent disclosed anything secret or confidential in the proposed petitions to the Members of Congress.[6] And surely it could not conceivably be argued that, as a general proposition, a regulation requiring the preclearance of the content of all petitions to be circulated by servicemen in time of peace is "necessary to the security of the United States."

For these reasons, I believe that the judgment of the Court of Appeals should be affirmed.[7] Accordingly, I respectfully dissent from the opinion and judgment of the Court.

MR. JUSTICE STEVENS, dissenting.

The question whether 10 U. S. C. § 1034 includes a right to circulate petitions is not an easy one for me. I must confess that I think the plain language of the statute and its sparse legislative history slightly favor the Court's reading that it does not. Nevertheless, I agree with MR. JUSTICE STEWART'S

[6] Congress included the "necessary to the security" exception in § 1034 so that the Government could prohibit servicemen from imparting "secret matter" in their communications with Congress. 97 Cong. Rec. 3877 (1951).

[7] The respondent was demoted to the standby reserves because he had failed to submit for preclearance a petition addressed to the Secretary of Defense as well as petitions separately addressed to various Members of Congress. While the latter petitions were protected by 10 U. S. C. § 1034, the former was not. I would nonetheless affirm the judgment of the Court of Appeals. There is no reason to believe that the respondent suffered the demotion only for his circulation of the petition addressed to the Secretary of Defense.

construction of the statute for two reasons. First, in a doubtful case I believe a statute enacted to remove impediments to the flow of information to Congress should be liberally construed. Second, the potentially far-reaching consequences of deciding the constitutional issue [1] counsel avoidance of that issue if the "case can be fairly decided on a statutory ground." [2] MR. JUSTICE STEWART has surely demonstrated that that test is met here. I therefore respectfully dissent.

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[1] For the reasons stated by MR. JUSTICE BRENNAN, I do not consider the constitutional question foreclosed by the Court's decision in *Greer* v. *Spock*, 424 U. S. 828. Nor do I view it as so easy as to justify the novel practice of deciding the constitutional question before addressing the statutory issue. *Ante*, at 349.

[2] "Our settled practice . . . is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground. 'If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.' *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101, 105. The more important the issue, the more force there is to this doctrine." *University of California Regents* v. *Bakke*, 438 U. S. 265, 411–412 (opinion of STEVENS, J.) (footnote omitted).

IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL.

ON EXCEPTIONS TO REPORT OF SPECIAL MASTER

No. 67, Orig. Argued November 26, 1979—Decided January 21, 1980

Held: Failure to join the United States as a party to Idaho's action against Oregon and Washington to secure equitable apportionment of various runs of anadromous fish migrating between spawning grounds in Idaho and the Pacific Ocean, will not prevent this Court from entering an adequate judgment. Pp. 387–393.

(a) None of the federal interests cited by the Special Master as rendering impossible an adequate judgment in the absence of the United States as a party—the Government's control over the ocean fishery on the runs of the fish at issue, its management of the various dams that separate the spawning grounds in Idaho from the Pacific Ocean, and its role as trustee for the various Indian tribes with treaty rights in the fish at issue—constitutes a sufficient reason for dismissing the action for the failure to join the United States as the Special Master recommends. *Arizona* v. *California*, 298 U. S. 558, and *Texas* v. *New Mexico*, 352 U. S. 991, distinguished. Pp. 387–391.

(b) Washington's additional argument in favor of dismissing the complaint that any allocation of nontreaty fish to Idaho would abrogate an agreement between the Indian tribes and Oregon and Washington for managing the fish originating in the Columbia River System, is without merit, since such agreement only divides the available fish between treaty and nontreaty fishermen and does not purport to allocate the nontreaty share among the various States. Pp. 391–392.

(c) Washington's further assertion that for some time few if any fish have been taken from the runs at issue and that hence any further restrictions on fishing in zones open to commercial fishermen will have no appreciable effect upon the number of fish arriving in Idaho, goes to the merits of Idaho's claim and has little or nothing to do with the need to join the United States as a party. P. 392.

Exceptions to Special Master's report sustained, and case remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, BLACKMUN, POWELL, and STEVENS, JJ., joined. STEWART and MARSHALL, JJ., filed a dissenting statement, *post*, p. 393.

David H. Leroy, Attorney General of Idaho, *pro se*, argued the cause for plaintiffs. With him on the plaintiffs' exceptions to the report of the Special Master were *W. Hugh O'Riordan* and *John C. Vehlow*, Deputy Attorneys General.

James A. Redden, Attorney General, argued the cause for defendant State of Oregon. With him on the responses to the plaintiffs' exceptions to the report of the Special Master were *Raymond P. Underwood* and *Beverly B. Hall*, Assistant Attorneys General. *Slade Gorton*, Attorney General, argued the cause for defendant State of Washington. With him on the response to the plaintiffs' exceptions to the report of the Special Master was *Edward B. Mackie*, Deputy Attorney General.

Louis F. Claiborne argued the cause for the United States as *amicus curiae* in support of the report of the Special Master. With him on the memorandum were *Solicitor General McCree*, *Assistant Attorney General Moorman*, *Myles E. Flint*, and *Steven E. Carroll*.

Mr. Justice Rehnquist delivered the opinion of the Court.

Invoking this Court's original jurisdiction, the State of Idaho brought suit against the States of Oregon and Washington to secure equitable apportionment of various runs of anadromous fish migrating between spawning grounds in Idaho and the Pacific Ocean. We granted Idaho leave to file its complaint, but left open the questions whether that complaint stated a claim upon which relief may be granted and whether the United States was an indispensable party to the action. 429 U. S. 163 (1976). We later referred the action to a Special Master. 431 U. S. 952 (1977). On February 2, 1979, the Special Master recommended that Idaho's action be dismissed for failure to join the United States, but that the dismissal be without prejudice to Idaho's right to refile its suit at some later date if it is wholly unable to obtain a

remedy through negotiation with Oregon and Washington. Idaho has filed exceptions to that recommendation.

I

The Snake River rises in northwest Wyoming and flows across southern Idaho, eventually turning northward and forming the boundary between Idaho and Oregon for approximately 165 miles and between Idaho and Washington for approximately 30 miles. It then turns westward and enters Washington, whence it proceeds for approximately 100 miles to its confluence with the Columbia River. The Columbia River rises in British Columbia and flows southward through eastern Washington to its confluence with the Snake River. Just below that confluence it turns westward, forming the boundary between Oregon and Washington until it empties into the Pacific Ocean 270 miles downstream.

Numerous species of anadromous fish spawn in the gravel bars of the Columbia/Snake River System. After remaining in their hatch area for approximately two years, these fish migrate downstream to the Pacific Ocean, where they spend anywhere from one to four years. Near the end of their life cycle the anadromous fish return to the Columbia River and migrate upstream toward the waters of their origin to spawn. At issue in the present case are three particular runs of anadromous fish: spring chinook salmon, summer chinook salmon, and steelhead trout. To a significant extent, these three runs originate in, and would return to, spawning grounds within the State of Idaho.

A number of manmade conditions have combined with natural obstacles to deplete seriously the number of fish that return to Idaho successfully. During both their downstream and upstream migrations, anadromous fish originating in Idaho must cross a series of eight dams built and maintained by the United States Army Corps of Engineers. The Bonneville Dam, built in 1938, lies closest to the mouth of the Columbia River.

Fish crossing the Bonneville Dam on their way to Idaho also encounter the Dalles Dam, the John Day Dam, the McNary Dam, the Ice Harbor Dam, the Lower Monumental Dam, the Little Goose Dam, and, finally, the Lower Granite Dam. During their downstream migration, of course, the fish cross these dams in the reverse order.

At each of these dams, a portion of the water is released through turbines used to generate hydroelectric power. Water passing through these turbines is not conducive to either the "smolts" migrating downstream or the mature fish migrating upstream. Each dam is therefore equipped with a spillway, over which smolts can pass, and a "fish ladder," up which mature fish can climb. Because water sent over the spillways or fish ladders is not available to generate power, and because river conditions vary over time, the Corps of Engineers [1] is often faced with a choice between generating power and facilitating migration. Even under optimal conditions, when the Corps can allocate adequate water to the spillways and the fish ladders, those mechanisms themselves will cause a significant number of mortalities among migrating fish.

In addition to confronting these hurdles, anadromous fish afford a catch for both sport and commercial fishermen. The Federal Government regulates the ocean fishery in a zone stretching seaward from 3 to 200 miles from the seacoast. See Fishery Conservation and Management Act of 1976, 16 U. S. C. § 1801 *et seq.* Within the 3-mile limit and throughout their in-river migrations, however, the anadromous fish are the subject of state regulation.

In 1918, with the consent of Congress, Oregon and Washington entered into the Oregon-Washington Columbia River Fish Compact, ch. 47, 40 Stat. 515. The Compact attempts to

[1] To a certain extent, the United States Bureau of Reclamation and the Federal Energy Regulatory Commission also exercise some control over water releases. See Report of the Special Master 8.

assure uniformity in the regulation of anadromous fish in the Columbia River by preventing either State from altering its fishing regulations without the consent of the other State. Pursuant to this compact, Oregon and Washington have divided the Columbia River below the McNary Dam into six zones, with Zones 1 through 5 stretching between the Pacific Ocean and the Bonneville Dam and Zone 6 stretching between the Bonneville Dam and the McNary Dam. Idaho has attempted on a number of occasions to become a party to the Compact, but its efforts thus far have been unsuccessful.

In 1968, a number of Indian tribes who fished along the Columbia River brought suit against Oregon to protect fishing rights allegedly granted them under various treaties with the United States. See *Sohappy* v. *Smith*, 302 F. Supp. 899 (Ore. 1969). The District Court concluded that Oregon was obligated to structure its regulations so that the Indians would have "an opportunity to catch fish at their usual and accustomed places equal to that of other users to catch fish at locations preferred by them or by the state." *Id.*, at 910. The suit remained pending in the District Court, and, in 1974, Washington moved to intervene as a defendant. Eventually, the District Court determined that the treaties in question gave the Indians a right to 50% of the fish taken from the Columbia River. The United States Court of Appeals for the Ninth Circuit affirmed this determination. See *Sohappy* v. *Smith*, 529 F. 2d 570 (1976).

On February 25, 1977, the parties in the *Sohappy* litigation entered into a 5-year agreement for managing the fisheries on stocks of anadromous fish originating in the Columbia River System above the Bonneville Dam. Under the agreement, Zones 1 through 5 are open to all commercial fishermen. Zone 6, which extends from the Bonneville Dam 130 miles upstream to the McNary Dam, is restricted for use by Indians fishing pursuant to their treaty rights. A "technical advisory committee" estimates the number of fish in various

runs entering the Columbia River "destined to pass [the] Bonneville Dam." An agreed-upon "escapement" for spawning is subtracted from this total in-river run size; the remaining fish in the run are then allocated between treaty and nontreaty fishermen. Thus, for spring chinook salmon, one of the runs at issue here, the plan sets an escapement goal of 120,000 fish passing into Zone 6.[2] Where the run size exceeds the escapement goal by less than 30,000 fish, no nontreaty fishermen may take spring chinook salmon at any time before the fish pass into the Snake River on the other side of Zone 6. Where the run size exceeds the escapement goal by more than 30,000 fish, nontreaty fishermen may take 60% of that excess while treaty fishermen may take 40%. Other runs of fish are regulated similarly, with a predetermined escapement goal and with the remainder of the fish being divided between treaty and nontreaty fishermen.[3]

In the present suit, Idaho alleges that nontreaty fishermen in Oregon and Washington take a disproportionate share of fish destined for Idaho, thereby depleting those runs to the detriment of Idaho fishermen.[4] It seeks equitable apportionment of anadromous fish destined for Idaho in the Columbia River. Significantly, Idaho does not contend that the Indians' share of anadromous fish should be reduced, but rather seeks to share in that portion of the catch now taken exclusively by nontreaty fishermen in Oregon and Washington.

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[2] The plan estimates that, under normal river conditions, an escapement of 120,000 spring chinook salmon above the Bonneville Dam will provide 30,000 spring chinook salmon at the Lower Granite Dam, the last dam separating the fish from Idaho's spawning grounds.

[3] For summer steelhead trout, the agreement sets an escapement goal of 150,000 fish passing the Bonneville Dam or 30,000 fish at the Lower Granite Dam. If the run exceeds these goals, the excess is apportioned entirely to nontreaty fishermen. As for summer chinook salmon, the third run at issue here, the agreement states that runs of those fish "are precariously low and do not warrant any fishery at the present time. . . ."

[4] According to Idaho, it has no significant commercial fishery, but only sport fisheries.

The Special Master concluded that Idaho's complaint presents a justiciable controversy, and indicated that he found some merit in Idaho's claim that it was entitled to equitable apportionment. Nevertheless, the Special Master recommended that this suit be dismissed for failure to join the United States Government, which has invoked its sovereign immunity and has steadfastly refused to intervene as a party.[5] In deciding that the United States was an indispensable party to this litigation, the Special Master looked for guidance to Rule 19 (b) of the Federal Rules of Civil Procedure, which lists four factors to be considered in deciding whether a suit can proceed in the absence of an allegedly necessary party. These factors are (1) the extent to which a judgment rendered in the party's absence might be prejudicial to that party or those already parties; (2) the extent to which the court could lessen or avoid such prejudice by shaping the judgment or relief; (3) the court's ability to render an adequate judgment in the party's absence; and (4) the adequacy of remedies available to the plaintiff should the suit be dismissed.

The Special Master concluded that factors (1), (2), and (4) weighed in favor of allowing Idaho to prosecute this suit. Because the United States could not be bound by any judgment rendered in its absence, and because Idaho was seeking no relief against the treaty fishermen for whom the United States acts as trustee, no absent party would be prejudiced by the relief sought by Idaho. Furthermore, the Special Master felt that this suit offered Idaho its only practical avenue of relief. Oregon and Washington had consistently rebuffed Idaho's attempts to join the Columbia River Fish Compact or to otherwise negotiate some sort of accommodation. Nor did it appear that Idaho could intervene in the *Sohappy* litigation

[5] The United States has adopted this position despite its repeated concession that Idaho appears to be entitled to some sort of equitable relief. See Memorandum from Louis F. Claiborne to the Solicitor General, reproduced as Appendix C to Idaho's exceptions, p. C–5; Tr. of Oral Arg. 60.

to assert its interest. Given the pendency of the 5-year agreement, the *Sohappy* court quite probably would reject Idaho's motion to intervene as untimely. Moreover, any attempt by Idaho to assert in that litigation an interest adverse to Oregon and Washington might convert that suit into a dispute among the States, a dispute over which the District Court would have no jurisdiction.

Although these factors weighed heavily in favor of allowing Idaho's suit to proceed, the Special Master held that federal interests were so intertwined in this suit that this Court could not possibly render an adequate judgment in the absence of the United States as a party. In particular, the Special Master cited the United States Government's control over the ocean fishery, its management of the various dams along the Columbia and Snake Rivers, and its role as trustee for the various Indian tribes with fishing rights in the anadromous fish at issue here. Balancing factor (3) of Rule 19 (b) against the other three factors, the Special Master concluded that Idaho's complaint should be dismissed. At the suggestion of the United States, however, the Special Master recommended that the dismissal be without prejudice to Idaho's right to reinstitute the suit if it is wholly unable to obtain a remedy through negotiation with Oregon and Washington. In suggesting this disposition, the United States implied that it would intervene in a later action brought by Idaho should Oregon and Washington remain intractable.

II

Idaho has filed exceptions to the Special Master's report and has asked us to reject his conclusion that the United States is a necessary party to this suit. In deciding this issue, we consider separately each of the federal interests cited by the Special Master as rendering impossible an adequate judgment without joinder of the United States Government.

First, the Special Master noted that the United States controls the ocean fishery on the runs of anadromous fish at issue

here during that portion of their lifespan when they are outside the 3-mile limit in the Pacific Ocean. Nevertheless, we do not understand either the Special Master or the defendants to rely heavily upon this interest as evidence of the necessity for joining the United States Government as a party in this litigation. Idaho seeks apportionment of those fish entering the Columbia River destined for spawning grounds in Idaho. While regulation of the ocean fishery may have some effect upon the total number of anadromous fish returning to the Columbia River,[6] it has little to do with proper allocation of the rights to take those fish once they have entered the river.

Second, the Special Master cited the role of the United States in operating the eight dams that separate the hatching grounds in Idaho from the Pacific Ocean. He pointed out that, at each dam, the Corps of Engineers must allocate water among the turbines, fish ladders, and spillways. Under varying river conditions, this allocation often requires a choice between the generation of power and the survival of migrating fish. The Special Master felt that, without authority to bind the United States to whatever judgment was entered in this case, he could not ensure that any additional fish allowed to pass through the first five fishing zones would ever reach the State of Idaho.

We do not find this consideration a persuasive reason for dismissing Idaho's suit. We can assume, as suggested by defendants, that the eight dams along the Columbia and Snake Rivers are the primary reason why more fish do not successfully migrate back to Idaho. Nevertheless, Idaho stresses that it has no quarrel with the operation of the various dams. It argues, quite persuasively we believe, that greater numbers of fish reaching each dam will, under all but the most adverse

[6] The *Sohappy* agreement, however, is "based upon the premise" that the United States, through the Pacific Fishery Management Council, will regulate ocean fishing on the runs at issue here so that the ocean catches will be "essentially *de minimis* portions" of those runs.

river conditions, result in greater numbers of fish crossing each dam. The mortality rate at each dam for any given set of river conditions can be, and has been, estimated and taken into account in apportionment formulas. In the case of spring chinook salmon, for example, the *Sohappy* agreement states that "[u]nder average river flow conditions, 120,000 fish at Bonneville Dam will generally provide 30,000 fish at Lower Granite Dam and 150,000 fish at Bonneville Dam will generally provide 37,500 fish at Lower Granite Dam." If Oregon and Washington fishermen are taking more than their fair share of Idaho-bound anadromous fish, this Court could set aside a portion of those fish for Idaho, taking into account the estimable mortality rate at each dam.

Third, the Special Master cited the role of the United States Government as trustee for the various Indian tribes that fish the runs at issue here. Although, as noted above, the Special Master found that a judgment rendered in this case would not adversely affect the interests of those Indians, he felt that this Court could not render a complete judgment unless it could guarantee that the Indians would not take the fish allocated to Idaho.

As a mathematical proposition, the relief sought by Idaho need not involve the Indians at all. Any particular run of anadromous fish entering the Columbia River destined to pass the Bonneville Dam must be allocated to one of three categories: nontreaty catch, treaty catch, and spawning escapement. Under present practices, as memorialized in the *Sohappy* agreement, nontreaty fishermen conduct their operations almost entirely in Zones 1 through 5. Fish allocated to Indian fisheries and to escapement are then allowed to pass the Bonneville Dam and into Zone 6. The treaty fishermen take their allocation in that zone and allow the spawning escapement to continue upriver. Idaho would have this Court order Oregon and Washington to allow a portion of the nontreaty share to pass into Zone 6 along with the treaty share

and the escapement. According to the Special Master, however, without some control over treaty fishermen this Court could not guarantee that Idaho's allocation would ever get out of Zone 6.

We do not share the Special Master's pessimism. Under the *Sohappy* agreement the Indians are limited to a fixed share of the fish entering Zone 1 and destined for the waters above the Bonneville Dam. Absent evidence to the contrary, we cannot assume that the Indians would violate that agreement by taking more fish than have been allocated to them. Nor can we assume that Oregon and Washington, the other parties to the *Sohappy* agreement, would ignore any such violation. Because the treaty and nontreaty commercial fisheries undoubtedly compete to a certain extent, Oregon and Washington might find it in their own interests to enforce the ceiling on treaty fishing in Zone 6. Finally, should other remedies fail, Idaho might be able to intervene in the *Sohappy* litigation for the sole purpose of enforcing the limitations on treaty fishing. Thus, we cannot agree with the Special Master that failure to join the United States as a party to this litigation would prevent this Court from rendering an adequate judgment.[7]

This case is quite different from earlier cases where we found the United States to be an indispensable party to the

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[7] The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning runs of anadromous fish and because this Court might have to retain continuing jurisdiction over the management of the fisheries in the Columbia and Snake Rivers. We rejected a similar argument in *Nebraska* v. *Wyoming*, 325 U. S. 589, 616 (1945), a case involving apportionment of water:

"There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province. . . . But the efforts at settlement in this case have failed. A genuine controversy exists. . . . The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution."

prosecution of a suit within our original jurisdiction. In *Arizona* v. *California*, 298 U. S. 558 (1936), a suit involving the division of theretofore unapportioned water in the Colorado River, we found that the Federal Government already had exercised its authority to impound that water and to control its disposition. See *id.*, at 570. Here, by contrast, the United States has made no attempt to control apportionment of the in-river harvest of anadromous fish, except to the extent that it has acted to protect treaty rights. In *Texas* v. *New Mexico*, 352 U. S. 991 (1957), another suit involving the apportionment of water flowing in an interstate river, we adopted the finding of the Special Master that the United States was indispensable in its role as trustee for various Indians. A decree in that case, however, would have "necessarily affect[ed] adversely and immediately the United States" in its fiduciary capacity. See Report of the Special Master, O. T. 1956, No. 9 Orig., p. 41. In this case, the Special Master specifically dismissed the possibility of prejudice to the United States, either in its role as trustee for the Indians or in its role as manager of the ocean fishery and the dams. Cf. *United States* v. *Candelaria*, 271 U. S. 432, 438, 443 (1926).

Moving beyond the report of the Special Master, Washington has advanced two additional arguments in favor of dismissing Idaho's complaint. First, Washington asserted at oral argument that the *Sohappy* agreement was founded on the assumption that nontreaty fishermen in Washington and Oregon were entitled to take any fish not allocated either to treaty fishermen or to spawning escapement. According to Washington, any allocation of nontreaty fish to Idaho would result in abrogation of the *Sohappy* agreement. See Tr. of Oral Arg. 46–47. The *Sohappy* agreement, however, only divides the available fish between treaty and nontreaty fishermen. It does not purport to allocate the nontreaty share among the various States. Even if the agreement did guarantee Washington or Oregon fishermen any fish not allocated

to treaty fishermen or to escapement, such an agreement could not and should not survive a finding by this Court that Idaho is entitled to some of those fish presently being taken by Oregon and Washington. Moreover, should Oregon or Washington seek to reopen negotiations in the *Sohappy* litigation, an attempt by Idaho to intervene in that litigation might meet with more success than an attempt to intervene in the face of an extant 5-year agreement.

Washington also argues that, at present and for the past several years, few if any fish have been taken from the runs at issue here and that further restrictions on fishing in Zones 1 through 5 will have no appreciable effect upon the number of spring chinook salmon, summer chinook salmon, and steelhead trout arriving in Idaho. This assertion, however, goes to the merits of Idaho's claim and has little or nothing to do with the need to join the United States as a party to this litigation. Idaho's narrow complaint is a two-edged sword. It has sidestepped the need to join the United States as a party by seeking only a share of the fish now being caught by nontreaty fishermen in Oregon and Washington. It now must shoulder the burden of proving that the nontreaty fisheries in those two States have adversely and unfairly affected the number of fish arriving in Idaho. A trial on the merits may well demonstrate that the target fisheries have, in fact, had no effect upon the runs of anadromous fish at issue here. Alternatively, a trial may demonstrate that natural and man-made obstacles will prevent any additional fish allowed to pass out of Zone 5 from reaching Idaho in numbers justifying additional restrictions on nontreaty fisheries in Oregon and Washington. Cf. *Washington* v. *Oregon*, 297 U. S. 517 (1936) (water not used by Oregon would sink into deep gravel in the bed of the river and never reach users in Washington). Neither of these possibilities, however, persuades us that an adequate judgment is impossible without a joinder of the United States Government.

III

We therefore sustain Idaho's exceptions to the Special Master's report recommending that Idaho's complaint be dismissed, and remand the case to the Special Master for further proceedings not inconsistent with this opinion.

So ordered.

MR. JUSTICE STEWART and MR. JUSTICE MARSHALL dissent. Agreeing with the Special Master's report, they would overrule Idaho's exceptions thereto and would order that the complaint be dismissed.

UNITED STATES *v.* BAILEY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-990. Argued November 7, 1979—Decided January 21, 1980*

Upon being apprehended after their escape from the District of Columbia jail, respondents were indicted for violating 18 U. S. C. § 751 (a), which governs escape from federal custody. At the trial of respondents Cooley, Bailey, and Walker, the District Court, after respondents had adduced evidence of conditions in the jail and their reasons for not returning to custody, rejected their proffered jury instruction on duress as a defense, ruling that they had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions, and, after receiving instructions to disregard the evidence of the jail conditions, the jury convicted respondents of violating § 751 (a). At respondent Cogdell's trial, the District Court ruled that, absent testimony of what he did between the time of his escape and his apprehension, he could not present evidence of conditions at the jail, and he was also convicted by the jury of violating § 751 (a). The Court of Appeals reversed each respondent's conviction and remanded for new trials, holding that the District Court should have allowed the respective juries to consider the evidence of coercive conditions at the jail in determining whether respondents had formulated the requisite intent to sustain a conviction under § 751 (a), which required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement," an escapee not acting with the requisite intent if he escaped in order to avoid "non-confinement conditions" as opposed to "normal aspects of 'confinement.'" The court further held that since respondents had been indicted for fleeing and escaping on or about a certain date and not for leaving and staying away from custody, and since the jury instructions gave the impression that respondents were being tried only for leaving the jail on a certain date, and not for failing to return at some later date, neither respondents nor the juries were acquainted with the proposition that the escapes in question were continuing

*Together with *United States* v. *Cogdell*, also on certiorari to the same court (see this Court's Rule 23 (5)).

offenses, an omission which constituted a violation of respondents' right to a jury trial.

Held:

1. The prosecution fulfills its burden under § 751 (a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission. Nothing in § 751 (a)'s language or legislative history indicates that Congress intended to require such a heightened standard of culpability or such a narrow definition of confinement as the Court of Appeals required. Pp. 403–409.

2. In order to be entitled to an instruction on duress or necessity as a defense to a charge of escape, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure, and an indispensable element of such an offer is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. On the record here, such evidence and testimony were lacking, and hence respondents were not entitled to any instruction on duress or necessity. Pp. 409–415.

(a) Escape from federal custody as defined in § 751 (a) is a continuing offense, and an escapee can be held liable for failure to return to custody as well as for his initial departure. Pp. 413–414.

(b) But there was no significant "variance" in the indictments here merely because respondents were not indicted under a theory of escape as a continuing offense and because the District Court did not explain such theory to the juries. The indictments, which tracked closely § 751 (a)'s language, were sufficient under the standard deeming an indictment sufficient "if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense," *Hamling* v. *United States*, 418 U. S. 87, 117. And it was unnecessary for the District Court to elaborate for the juries' benefit on the continuing nature of the charged offense, where the evidence failed as a matter of law in a crucial particular to reach the minimum threshold that would have required an instruction on respondents' theory of the case generally. Pp. 414–415.

3. If an affirmative defense consists of several elements and testimony supporting one element is, as here, insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense. If it were held that the juries in these cases should have been subjected to a potpourri of evidence as to the jail conditions even though a critical element of the proffered defense of duress or necessity was absent, every trial

under § 751 (a) would be converted into a hearing on the current state of the federal penal system. Pp. 416–417.

190 U. S. App. D. C. 142, 585 F. 2d 1087, and 190 U. S. App. D. C. 185, 585 F. 2d 1130, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and STEVENS, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 417. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 419. MARSHALL, J., took no part in the consideration or decision of the cases.

Edwin S. Kneedler argued the cause for the United States. With him on the briefs were *Solicitor General McCree, Assistant Attorney General Heymann, Kenneth S. Geller, Jerome M. Feit,* and *John DePue.*

Richard S. Kohn argued the cause for respondents. With him on the brief were *John Townsend Rich, Robert A. Robbins, Jr.,* and *Dorothy Sellers.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the early morning hours of August 26, 1976, respondents Clifford Bailey, James T. Cogdell, Ronald C. Cooley, and Ralph Walker, federal prisoners at the District of Columbia jail, crawled through a window from which a bar had been removed, slid down a knotted bedsheet, and escaped from custody. Federal authorities recaptured them after they had remained at large for a period of time ranging from one month to three and one-half months. Upon their apprehension, they were charged with violating 18 U. S. C. § 751 (a), which governs escape from federal custody.[1] At their trials, each of the

[1] Title 18 U. S. C. § 751 (a) provides:

"Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful

respondents adduced or offered to adduce evidence as to various conditions and events at the District of Columbia jail, but each was convicted by the jury. The Court of Appeals for the District of Columbia Circuit reversed the convictions by a divided vote, holding that the District Court had improperly precluded consideration by the respective juries of respondents' tendered evidence. We granted certiorari, 440 U. S. 957, and now reverse the judgments of the Court of Appeals.

In reaching our conclusion, we must decide the state of mind necessary for violation of § 751 (a) and the elements that constitute defenses such as duress and necessity. In explaining the reasons for our decision, we find ourselves in a position akin to that of the mother crab who is trying to teach her progeny to walk in a straight line, and finally in desperation exclaims: "Don't do as I do, do as I say." The Act of Congress we construe consists of one sentence set forth in the margin, n. 1, *supra;* our own pragmatic estimate, expressed *infra,* at 417, is that "[i]n general, trials for violations of § 751 (a) should be simple affairs." Yet we have written, reluctantly but we believe necessarily, a somewhat lengthy opinion supporting our conclusion, because in enacting the Federal Criminal Code Congress legislated in the light of a long history of case law that is frequently relevant in fleshing out the bare bones of a crime that Congress may have proscribed in a single sentence. See *Morissette* v. *United States,* 342 U. S. 246 (1952).

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arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both."

Respondents were also charged with violating 22 D. C. Code § 2601 (1973), the District of Columbia's statute proscribing escape from prison. The District Court instructed the juries that if they found the respondents guilty of violating 18 U. S. C. § 751 (a) they should not consider the charges under 22 D. C. Code § 2601.

I

All respondents requested jury trials and were initially scheduled to be tried jointly. At the last minute, however, respondent Cogdell secured a severance. Because the District Court refused to submit to the jury any instructions on respondents' defense of duress or necessity and did not charge the jury that escape was a continuing offense, we must examine in some detail the evidence brought out at trial.

The prosecution's case in chief against Bailey, Cooley, and Walker was brief. The Government introduced evidence that each of the respondents was in federal custody on August 26, 1976, that they had disappeared, apparently through a cell window, at approximately 5:35 a. m. on that date, and that they had been apprehended individually between September 27 and December 13, 1976.

Respondents' defense of duress or necessity centered on the conditions in the jail during the months of June, July, and August 1976, and on various threats and beatings directed at them during that period. In describing the conditions at the jail, they introduced evidence of frequent fires in "Northeast One," the maximum-security cellblock occupied by respondents prior to their escape. Construed in the light most favorable to them, this evidence demonstrated that the inmates of Northeast One, and on occasion the guards in that unit, set fire to trash, bedding, and other objects thrown from the cells. According to the inmates, the guards simply allowed the fires to burn until they went out. Although the fires apparently were confined to small areas and posed no substantial threat of spreading through the complex, poor ventilation caused smoke to collect and linger in the cellblock.

Respondents Cooley and Bailey also introduced testimony that the guards at the jail had subjected them to beatings and to threats of death. Walker attempted to prove that he was an epileptic and had received inadequate medical attention for his seizures.

Consistently during the trial, the District Court stressed that, to sustain their defenses, respondents would have to introduce some evidence that they attempted to surrender or engaged in equivalent conduct once they had freed themselves from the conditions they described. But the court waited for such evidence in vain. Respondent Cooley, who had eluded the authorities for one month, testified that his "people" had tried to contact the authorities, but "never got in touch with anybody." App. 119. He also suggested that someone had told his sister that the Federal Bureau of Investigation would kill him when he was apprehended.

Respondent Bailey, who was apprehended on November 19, 1976, told a similar story. He stated that he "had the jail officials called several times," but did not turn himself in because "I would still be under the threats of death." Like Cooley, Bailey testified that "the FBI was telling my people that they was going to shoot me." *Id.*, at 169, 175–176.

Only respondent Walker suggested that he had attempted to negotiate a surrender. Like Cooley and Bailey, Walker testified that the FBI had told his "people" that they would kill him when they recaptured him. Nevertheless, according to Walker, he called the FBI three times and spoke with an agent whose name he could not remember. That agent allegedly assured him that the FBI would not harm him, but was unable to promise that Walker would not be returned to the D. C. jail. *Id.*, at 195–200.[2] Walker testified that he last called the FBI in mid-October. He was finally apprehended on December 13, 1976.

At the close of all the evidence, the District Court rejected respondents' proffered instruction on duress as a defense to

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[2] On rebuttal, the prosecution called Joel Dean, the FBI agent who had been assigned to investigate Walker's escape in August 1976. He testified that, under standard Bureau practice, he would have been notified of any contact made by Walker with the FBI. According to Dean, he never was informed of any such contact. App. 203–204.

prison escape.[3] The court ruled that respondents had failed as a matter of law to present evidence sufficient to support such a defense because they had not turned themselves in after they had escaped the allegedly coercive conditions. After receiving instructions to disregard the evidence of the conditions in the jail, the jury convicted Bailey, Cooley, and Walker of violating § 751 (a).

Two months later, respondent Cogdell came to trial before the same District Judge who had presided over the trial of his co-respondents. When Cogdell attempted to offer testimony concerning the allegedly inhumane conditions at the D. C. jail, the District Judge inquired into Cogdell's conduct between his escape on August 26 and his apprehension on September 28. In response to Cogdell's assertion that he "may have written letters," the District Court specified that Cogdell could testify only as to "what he did . . . [n]ot what he may have done." App. 230. Absent such testimony, however, the District Court ruled that Cogdell could not present evidence of conditions at the jail. Cogdell subsequently chose not to testify on his own behalf, and was convicted by the jury of violating § 751 (a).

By a divided vote, the Court of Appeals reversed each respondent's conviction and remanded for new trials. See 190 U. S. App. D. C. 142, 585 F. 2d 1087 (1978); 190 U. S.

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[3] Respondents asked the District Court to give the following instruction:

"Coercion which would excuse the commission of a criminal act must result from:

"1) Threathening [*sic*] conduct sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

"2) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

"3) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and

"4) The defendant committed the act to avoid the threathened [*sic*] harm."

App. D. C. 185, 585 F. 2d 1130 (1978). The majority concluded that the District Court should have allowed the jury to consider the evidence of coercive conditions in determining whether the respondents had formulated the requisite intent to sustain a conviction under § 751 (a). According to the majority, § 751 (a) required the prosecution to prove that a particular defendant left federal custody voluntarily, without permission, and "with an intent to avoid confinement." 190 U. S. App. D. C., at 148, 585 F. 2d, at 1093. The majority then defined the word "confinement" as encompassing only the "normal aspects" of punishment prescribed by our legal system. Thus, where a prisoner escapes in order to avoid "non-confinement" conditions such as beatings or homosexual attacks, he would not necessarily have the requisite intent to sustain a conviction under § 751 (a). According to the majority:

> "When a defendant introduces evidence that he was subject to such 'non-confinement' conditions, the crucial factual determination on the intent issue is . . . whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement. In making this determination the jury is to be guided by the trial court's instructions pointing out those factors that are most indicative of the presence or absence of an intent to avoid confinement." 190 U. S. App. D. C., at 148, n. 17, 585 F. 2d, at 1093, n. 17 (emphasis in original).

Turning to the applicability of the defense of duress or necessity, the majority assumed that escape as defined by § 751 (a) was a "continuing offense" as long as the escapee was at large. Given this assumption, the majority agreed with the District Court that, under normal circumstances, an escapee must present evidence of coercion to justify his continued absence from custody as well as his initial departure. Here, however, respondents had been indicted for "flee[ing]

and escap[ing]" "[o]n or about August 26, 1976," and not for "leaving *and staying away from* custody." 190 U. S. App. D. C., at 155, 585 F. 2d, at 1100 (emphasis in original). Similarly, "[t]he trial court's instructions when read as a whole clearly give the impression that [respondents] were being tried only for leaving the jail on August 26, and not for failing to return at some later date." *Id.*, at 155, n. 50, 585 F. 2d, at 1100, n. 50. Under these circumstances, the majority believed that neither respondents nor the juries were acquainted with the proposition that the escapes in question were continuing offenses. This failure, according to the majority, constituted "an obvious violation of [respondents'] constitutional right to jury trial." *Id.*, at 156, 585 F. 2d, at 1101.

The dissenting judge objected to what he characterized as a revolutionary reinterpretation of criminal law by the majority. He argued that the common-law crime of escape had traditionally required only "general intent," a mental state no more sophisticated than an "intent to go beyond permitted limits." *Id.*, at 177, 585 F. 2d, at 1122 (emphasis deleted). The dissent concluded that the District Court had properly removed from consideration each respondent's contention that conditions and events at the D. C. jail justified his escape, because each respondent had introduced no evidence whatsoever justifying his continued absence from jail following that escape.

II

Criminal liability is normally based upon the concurrence of two factors, "an evil-meaning mind [and] an evil-doing hand. . . ." *Morissette* v. *United States*, 342 U. S., at 251. In the present case, we must examine both the mental element, or *mens rea*, required for conviction under § 751 (a) and the circumstances under which the "evil-doing hand" can avoid liability under that section because coercive conditions or necessity negates a conclusion of guilt even though the necessary *mens rea* was present.

A

Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime. In 1970, the National Commission on Reform of Federal Criminal Laws decried the "confused and inconsistent ad hoc approach" of the federal courts to this issue and called for "a new departure." See 1 Working Papers of the National Commission on Reform of Federal Criminal Laws 123 (hereinafter Working Papers). Although the central focus of this and other reform movements has been the codification of workable principles for determining criminal culpability, see, *e. g.*, American Law Institute, Model Penal Code §§ 2.01–2.13 (Prop. Off. Draft 1962) (hereinafter Model Penal Code); S. 1, 94th Cong., 2d Sess., §§ 301–303 (1976), a byproduct has been a general rethinking of traditional *mens rea* analysis.

At common law, crimes generally were classified as requiring either "general intent" or "specific intent." This venerable distinction, however, has been the source of a good deal of confusion. As one treatise explained:

> "Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of *mens rea*, while 'specific intent' is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place." W. LaFave & A. Scott, Handbook on Criminal Law § 28, pp. 201–202 (1972) (footnotes omitted) (hereinafter LaFave & Scott).

This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternative analysis of *mens rea*. See *id.*, at 202. This new approach, exemplified

in the American Law Institute's Model Penal Code, is based on two principles. First, the ambiguous and elastic term "intent" is replaced with a hierarchy of culpable states of mind. The different levels in this hierarchy are commonly identified, in descending order of culpability, as purpose, knowledge, recklessness, and negligence.[4] See LaFave & Scott 194; Model Penal Code § 2.02. Perhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of "purpose" and "knowledge." As we pointed out in *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 445 (1978), a person who causes a particular result is said to act purposefully if " 'he consciously desires that result, whatever the likelihood of that result happening from his conduct,' " while he is said to act knowingly if he is aware " 'that that result is practically certain to follow from his conduct, whatever his desire may be as to that result.' "[5]

In the case of most crimes, "the limited distinction between knowledge and purpose has not been considered important since 'there is good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.' " *United States* v. *United States Gypsum Co.*, *supra*, at 445, quoting LaFave & Scott 197. Thus, in *Gypsum* we held that a person could be held criminally liable under § 1 of the Sherman Act if that person exchanged price

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[4] This hierarchy does not attempt to cover those offenses where criminal liability is imposed in the absence of any *mens rea* whatsoever. Such "strict liability" crimes are exceptions to the general rule that criminal liability requires an "evil-meaning mind." Compare *Morissette* v. *United States*, 342 U. S. 246, 250–263 (1952), with *United States* v. *Dotterweich*, 320 U. S. 277, 280–281, 284 (1943). Under the Model Penal Code, the only offenses based on strict liability are "violations," actions punishable by a fine, forfeiture, or other civil penalty rather than imprisonment. See Model Penal Code § 2.05 (1)(a). See also LaFave & Scott 218–223.

[5] Quoting *id.*, at 196.

information with a competitor either with the knowledge that the exchange would have unreasonable anticompetitive effects or with the purpose of producing those effects. 438 U. S., at 444–445, and n. 21.

In certain narrow classes of crimes, however, heightened culpability has been thought to merit special attention. Thus, the statutory and common law of homicide often distinguishes, either in setting the "degree" of the crime or in imposing punishment, between a person who knows that another person will be killed as the result of his conduct and a person who acts with the specific purpose of taking another's life. See LaFave & Scott 196–197. Similarly, where a defendant is charged with treason, this Court has stated that the Government must demonstrate that the defendant acted with a purpose to aid the enemy. See *Haupt* v. *United States*, 330 U. S. 631, 641 (1947). Another such example is the law of inchoate offenses such as attempt and conspiracy, where a heightened mental state separates criminality itself from otherwise innocuous behavior. See Model Penal Code § 2.02, Comments, p. 125 (Tent. Draft No. 4, 1955) (hereinafter MPC Comments).

In a general sense, "purpose" corresponds loosely with the common-law concept of specific intent, while "knowledge" corresponds loosely with the concept of general intent. See *ibid.*; LaFave & Scott 201–202. Were this substitution of terms the only innovation offered by the reformers, it would hardly be dramatic. But there is another ambiguity inherent in the traditional distinction between specific intent and general intent. Generally, even time-honored common-law crimes consist of several elements, and complex statutorily defined crimes exhibit this characteristic to an even greater degree. Is the same state of mind required of the actor for each element of the crime, or may some elements require one state of mind and some another? In *United States* v. *Feola*, 420 U. S. 671 (1975), for example, we were asked to decide

whether the Government, to sustain a conviction for assaulting a federal officer under 18 U. S. C. § 111, had to prove that the defendant knew that his victim was a federal officer. After looking to the legislative history of § 111, we concluded that Congress intended to require only "an intent to assault, not an intent to assault a federal officer." 420 U. S., at 684. What *Feola* implied, the American Law Institute stated: "[C]lear analysis requires that the question of the kind of culpability required to establish the commission of an offense be faced separately with respect to each material element of the crime." MPC Comments 123. See also Working Papers 131; LaFave & Scott 194.

Before dissecting § 751 (a) and assigning a level of culpability to each element, we believe that two observations are in order. First, in performing such analysis courts obviously must follow Congress' intent as to the required level of mental culpability for any particular offense. Principles derived from common law as well as precepts suggested by the American Law Institute must bow to legislative mandates. In the case of § 751 (a), however, neither the language of the statute nor the legislative history mentions the *mens rea* required for conviction.[6]

Second, while the suggested element-by-element analysis is a useful tool for making sense of an otherwise opaque concept, it is not the only principle to be considered. The administration of the federal system of criminal justice is confided to ordinary mortals, whether they be lawyers, judges, or jurors. This system could easily fall of its own weight if courts or

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[6] This omission does not mean, of course, that § 751 (a) defines a "strict liability" crime for which punishment can be imposed without proof of any *mens rea* at all. As we held in *Morissette* v. *United States*, *supra*, at 263, "mere omission [from the statute] of any mention of intent will not be construed as eliminating that element from the crimes denounced." See also *United States* v. *United States Gypsum Co.*, 438 U. S. 422, 437 (1978).

scholars become obsessed with hair-splitting distinctions, either traditional or novel, that Congress neither stated nor implied when it made the conduct criminal.

As relevant to the charges against Bailey, Cooley, and Walker, § 751 (a) required the prosecution to prove (1) that they had been in the custody of the Attorney General, (2) as the result of a conviction, and (3) that they had escaped from that custody. As for the charges against respondent Cogdell, § 751 (a) required the same proof, with the exception that his confinement was based upon an arrest for a felony rather than a prior conviction. Although § 751 (a) does not define the term "escape," courts and commentators are in general agreement that it means absenting oneself from custody without permission. See, *e. g.*, 190 U. S. App. D. C., at 148, 585 F. 2d, at 1093; *id.*, at 177, 585 F. 2d, at 1122 (Wilkey, J., dissenting); *United States* v. *Wilke*, 450 F. 2d 877 (CA9 1971), cert. denied, 409 U. S. 918 (1972). See also 2 J. Bishop, Criminal Law § 1103, p. 819 (9th ed. 1923); 1 W. Burdick, Law of Crime 462–463 (1946); R. Perkins, Criminal Law 429 (1957); 3 F. Wharton, Criminal Law § 2003, p. 2178 (11th ed. 1912).

Respondents have not challenged the District Court's instructions on the first two elements of the crime defined by § 751 (a). It is undisputed that, on August 26, 1976, respondents were in the custody of the Attorney General as the result of either arrest on charges of felony or conviction. As for the element of "escape," we need not decide whether a person could be convicted on evidence of recklessness or negligence with respect to the limits on his freedom. A court may someday confront a case where an escapee did not know, but should have known, that he was exceeding the bounds of his confinement or that he was leaving without permission. Here, the District Court clearly instructed the juries that the prosecution bore the burden of proving that respondents "knowingly committed an act which the law makes a crime" and that they

acted "knowingly, intentionally, and deliberately. . . ." App. 221–223, 231–233. At a minimum, the juries had to find that respondents knew they were leaving the jail and that they knew they were doing so without authorization. The sufficiency of the evidence to support the juries' verdicts under this charge has never seriously been questioned, nor could it be.

The majority of the Court of Appeals, however, imposed the added burden on the prosecution to prove as a part of its case in chief that respondents acted "with an intent to avoid confinement." While, for the reasons noted above, the word "intent" is quite ambiguous, the majority left little doubt that it was requiring the Government to prove that the respondents acted with the purpose—that is, the conscious objective—of leaving the jail without authorization. In a footnote explaining their holding, for example, the majority specified that an escapee did not act with the requisite intent if he escaped in order to avoid " 'non-confinement' conditions" as opposed to "normal aspects of 'confinement.' " 190 U. S. App. D. C., at 148, n. 17, 585 F. 2d, at 1093, n. 17.

We find the majority's position quite unsupportable. Nothing in the language or legislative history of § 751 (a) indicates that Congress intended to require either such a heightened standard of culpability or such a narrow definition of confinement. As we stated earlier, the cases have generally held that, except in narrow classes of offenses, proof that the defendant acted knowingly is sufficient to support a conviction. Accordingly, we hold that the prosecution fulfills its burden under § 751 (a) if it demonstrates that an escapee knew his actions would result in his leaving physical confinement without permission. Our holding in this respect comports with parallel definitions of the crime of escape both in the Model Penal Code and in a proposed revision of the Federal Criminal Code. See Model Penal Code §§ 2.02 (3), 242.6 (1); Report of Senate Committee on the Judiciary to Accompany S. 1, S. Rep. No. 94–00, pp. 333–334 (Comm.

Print 1976).[7] Moreover, comments accompanying the proposed revision of the Federal Criminal Code specified that the new provision covering escape "substantially carrie[d] forward existing law. . . ." *Id.*, at 332.

B

Respondents also contend that they are entitled to a new trial because they presented (or, in Cogdell's case, could have presented) sufficient evidence of duress or necessity to submit such a defense to the jury. The majority below did not confront this claim squarely, holding instead that, to the extent that such a defense normally would be barred by a prisoner's failure to return to custody, neither the indictment nor the jury instructions adequately described such a requirement. See 190 U. S. App. D. C., at 155–156, 585 F. 2d, at 1100–1101.

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the

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[7] Under the Model Penal Code, a defendant is guilty of escape if he acts even recklessly toward the material elements of the offense, since § 2.02 (3) provides that, unless otherwise provided in the definition of the offense, an element of any offense "is established if a person acts purposely, knowingly or recklessly with respect thereto." S. 1, a proposed revision of the Federal Criminal Code, would have imposed liability on an escapee "if (1) he is reckless as to the fact that he is subject to official detention, that is, he is aware that he may be in official detention . . . but disregards the risk that he is in fact in official detention, and (2) knowingly leaves the detention area or breaks from custody." S. Rep. No. 94-00, at 334. As noted earlier, we do not have to decide whether or under what circumstances an escapee can be held liable under § 751 (a) if he acted only recklessly with respect to the material elements of the offense. See *supra*, at 407.

actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity. See generally LaFave & Scott 374–384.

Modern cases have tended to blur the distinction between duress and necessity. In the court below, the majority discarded the labels "duress" and "necessity," choosing instead to examine the policies underlying the traditional defenses. See 190 U. S. App. D. C., at 152, 585 F. 2d, at 1097. In particular, the majority felt that the defenses were designed to spare a person from punishment if he acted "under threats or conditions that a person of ordinary firmness would have been unable to resist," or if he reasonably believed that criminal action "was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense." *Id.*, at 152–153, 585 F. 2d, at 1097–1098. The Model Penal Code redefines the defenses along similar lines. See Model Penal Code § 2.09 (duress) and § 3.02 (choice of evils).

We need not speculate now, however, on the precise contours of whatever defenses of duress or necessity are available against charges brought under § 751 (a). Under any definition of these defenses one principle remains constant: if there was a reasonable, legal alternative to violating the law, "a chance both to refuse to do the criminal act and also to avoid the threatened harm," the defenses will fail. LaFave & Scott 379.[8] Clearly, in the context of prison escape, the escapee is

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[8] See also *R. I. Recreation Center, Inc.* v. *Aetna Casualty & Surety Co.*, 177 F. 2d 603, 605 (CA1 1949) (a person acting under a threat of death to his relatives was denied defense of duress where he committed the crime

not entitled to claim a defense of duress or necessity unless and until he demonstrates that, given the imminence of the threat, violation of § 751 (a) was his only reasonable alternative. See *United States* v. *Boomer*, 571 F. 2d 543, 545 (CA10), cert. denied *sub nom. Heft* v. *United States*, 436 U. S. 911 (1978); *People* v. *Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969).

In the present case, the Government contends that respondents' showing was insufficient on two grounds. First, the Government asserts that the threats and conditions cited by respondents as justifying their escape were not sufficiently immediate or serious to justify their departure from lawful custody. Second, the Government contends that, once the respondents had escaped, the coercive conditions in the jail were no longer a threat and respondents were under a duty to terminate their status as fugitives by turning themselves over to the authorities.

Respondents, on the other hand, argue that the evidence of coercion and conditions in the jail was at least sufficient to go to the jury as an affirmative defense to the crime charged. As for their failure to return to custody after gaining their freedom, respondents assert that this failure should be but one factor in the overall determination whether their initial departure was justified. According to respondents, their failure to surrender "may reflect adversely on the bona fides of [their] motivation" in leaving the jail, but should not with-

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even though he had an opportunity to contact the police); *People* v. *Richards*, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969) (prisoner must resort to administrative or judicial channels to remedy coercive prison conditions); Model Penal Code § 2.09 (1) (actor must succumb to a force or threat that "a person of reasonable firmness in his situation would have been unable to resist"); *id.*, § 3.02 (1) (actor must believe that commission of crime is "necessary" to avoid a greater harm); Working Papers 277 (duress excuses criminal conduct, "if at all, because given the circumstances other reasonable men must concede that they too would not have been able to act otherwise").

draw the question of their motivation from the jury's consideration. Brief for Respondents 67. See also n. 3, *supra*.

We need not decide whether such evidence as that submitted by respondents was sufficient to raise a jury question as to their initial departures. This is because we decline to hold that respondents' failure to return is "just one factor" for the jury to weigh in deciding whether the initial escape could be affirmatively justified. On the contrary, several considerations lead us to conclude that, in order to be entitled to an instruction on duress or necessity as a defense to the crime charged, an escapee must first offer evidence justifying his continued absence from custody as well as his initial departure [9] and that an indispensable element of such an offer

[9] We appreciate the fact that neither the prosecution nor the defense in a criminal case may put in all its evidence simultaneously, and to the extent that applicable rules of case law do not otherwise preclude such an approach, a district court is bound to find itself in situations where it admits evidence provisionally, subject to that evidence being later "tied in" or followed up by other evidence that makes the evidence conditionally admitted unconditionally admissible. In a civil action, the question whether a particular affirmative defense is sufficiently supported by testimony to go to the jury may often be resolved on a motion for summary judgment, but of course motions for summary judgment are creatures of civil, not criminal, trials. Thus, when we say that in order to have the theory of duress or necessity as a defense submitted to the jury an escapee must "first" offer evidence justifying his continuing absence from custody, we do not mean to impose a rigid mechanical formula on attorneys and district courts as to the order in which evidence supporting particular elements of a defense must be offered. The convenience of the jurors, the court, and the witnesses may all be best served by receiving the testimony "out of order" in certain circumstances, subject to an avowal by counsel that such testimony will later be "tied in" by testimony supporting the other necessary elements of a particular affirmative defense. Our holding here is a substantive one: an essential element of the defense of duress or necessity is evidence sufficient to support a finding of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity has lost its coercive force. As a general practice, trial courts will find it saves considerable time to require testimony on this element of the affirmative defense of duress or necessity first, simply because such

is testimony of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force.

First, we think it clear beyond peradventure that escape from federal custody as defined in § 751 (a) is a continuing offense and that an escapee can be held liable for failure to return to custody as well as for his initial departure. Given the continuing threat to society posed by an escaped prisoner, "the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie* v. *United States*, 397 U. S. 112, 115 (1970). Moreover, every federal court that has considered this issue has held, either explicitly or implicitly, that § 751 (a) defines a continuing offense. See, *e. g.*, *United States* v. *Michelson*, 559 F. 2d 567 (CA9 1977); *United States* v. *Cluck*, 542 F. 2d 728 (CA8), cert. denied, 429 U. S. 986 (1976); *United States* v. *Joiner*, 496 F. 2d 1314 (CA5), cert. denied, 419 U. S. 1002 (1974); *United States* v. *Chapman*, 455 F. 2d 746 (CA5 1972).

Respondents point out that *Toussie* calls for restraint in labeling crimes as continuing offenses. The justification for that restraint, however, is the tension between the doctrine of continuing offenses and the policy of repose embodied in stat-

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testimony can be heard in a fairly short time, whereas testimony going to the other necessary elements of duress or necessity may take considerably longer to present. Here, for example, the jury heard five *days* of testimony as to prison conditions, when in fact the trial court concluded, correctly, that testimony as to another essential element of this defense did not even reach a minimum threshold such that if the jury believed it that element of defense could be said to have been made out. But trial judges presiding over indictments based on § 751 (a) are in a far better position than are we to know whether, as a matter of the order of presenting witnesses and evidence, testimony from a particular witness may be allowed "out of order" subject to avowal, proffer, and the various other devices employed to avoid wasting the time of the court and jury with testimony that is irrelevant while at the same time avoiding if possible the necessity for recalling or seriously inconveniencing a witness.

utes of limitations. See 397 U. S., at 114–115. This tension is wholly absent where, as in the case of § 751 (a), the statute of limitations is tolled for the period that the escapee remains at large.[10]

The remaining considerations leading to our conclusion are, perhaps ironically, derived from the same concern for the statutory and constitutional right of jury trial upon which the majority of the Court of Appeals based its reasoning. There was no significant "variance" in the indictment merely because respondents had not been indicted under a theory of escape as a continuing offense and because the District Court did not explain this theory to the juries. We have held on several occasions that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend, and, second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *Hamling* v. *United States*, 418 U. S. 87, 117 (1974). These indictments, which track closely the language of § 751 (a), were undoubtedly sufficient under this standard. See 418 U. S., at 117. As for the alleged failure of the District Court to elaborate for the benefit of the jury on the continuing nature of the charged offense, we believe that such elaboration was unnecessary where, as here, the evidence failed as a matter of law in a crucial particular to reach the minimum threshold that would have required an instruction on respondents' theory of the case generally.

The Anglo-Saxon tradition of criminal justice, embodied in the United States Constitution and in federal statutes, makes jurors the judges of the credibility of testimony offered by witnesses. It is for them, generally, and not for appellate

[10] Title 18 U. S. C. § 3290 provides that "[n]o statute of limitations shall extend to any person fleeing from justice." Because an escaped prisoner is, by definition, a fugitive from justice, the statute of limitations normally applicable to federal offenses would be tolled while he remained at large. See, *e. g.*, *Howgate* v. *United States*, 7 App. D. C. 217 (1895).

courts, to say that a particular witness spoke the truth or fabricated a cock-and-bull story. An escapee who flees from a jail that is in the process of burning to the ground may well be entitled to an instruction on duress or necessity, " 'for he is not to be hanged because he would not stay to be burnt.' " *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). And in the federal system it is the jury that is the judge of whether the prisoner's account of his reason for flight is true or false. But precisely because a defendant is entitled to have the credibility of his testimony, or that of witnesses called on his behalf, judged by the jury, it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense—here that of duress or necessity.

We therefore hold that, where a criminal defendant is charged with escape and claims that he is entitled to an instruction on the theory of duress or necessity, he must proffer evidence of a bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force. We have reviewed the evidence examined elaborately in the majority and dissenting opinions below, and find the case not even close, even under respondents' versions of the facts, as to whether they either surrendered or offered to surrender at their earliest possible opportunity. Since we have determined that this is an indispensable element of the defense of duress or necessity, respondents were not entitled to any instruction on such a theory. Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense.[11]

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[11] Contrary to the implication of MR. JUSTICE BLACKMUN's dissent describing the rationale of the necessity defense as "a balancing of harms," *post*, at 427, we are construing an Act of Congress, not drafting it. The statute itself, as we have noted, requires no heightened *mens rea* that might be negated by any defense of duress or coercion. We nonetheless recognize that Congress in enacting criminal statutes legislates against a

III

In reversing the judgments of the Court of Appeals, we believe that we are at least as faithful as the majority of that court to its expressed policy of "allowing the jury to perform its accustomed role" as the arbiter of factual disputes. 190 U. S. App. D. C., at 151, 585 F. 2d, at 1096. The requirement of a threshold showing on the part of those who assert an affirmative defense to a crime is by no means a derogation of the importance of the jury as a judge of credibility. Nor is it based on any distrust of the jury's ability to separate fact from fiction. On the contrary, it is a testament to the importance of trial by jury and the need to husband the resources necessary for that process by limiting evidence in a trial to that directed at the elements of the crime or at affirmative defenses. If, as we here hold, an affirmative defense consists of several elements and testimony supporting one element is insufficient to sustain it even if believed, the trial court and jury need not be burdened with testimony supporting other elements of the defense.

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background of Anglo-Saxon common law, see *Morissette* v. *United States*, 342 U. S. 246 (1952), and that therefore a defense of duress or coercion may well have been contemplated by Congress when it enacted § 751 (a). But since the express purpose of Congress in enacting that section was to punish escape from penal custody, we think that some duty to return, a duty described more elaborately in the text, must be an essential element of the defense unless the congressional judgment that escape from prison is a crime be rendered wholly nugatory. Our principal difference with the dissent, therefore, is not as to the existence of such a defense but as to the importance of surrender as an element of it. And we remain satisfied that, even if credited by the jury, the testimony set forth at length in MR. JUSTICE BLACKMUN's dissenting opinion could not support a finding that respondents had no alternatives but to remain at large until recaptured anywhere from one to three and one-half months after their escape. To hold otherwise would indeed quickly reduce the overcrowding in prisons that has been universally condemned by penologists. But that result would be accomplished in a manner quite at odds with the purpose of Congress when it made escape from prison a federal criminal offense.

These cases present a good example of the potential for wasting valuable trial resources. In general, trials for violations of § 751 (a) should be simple affairs. The key elements are capable of objective demonstration; the *mens rea*, as discussed above, will usually depend upon reasonable inferences from those objective facts. Here, however, the jury in the trial of Bailey, Cooley, and Walker heard five days of testimony. It was presented with evidence of every unpleasant aspect of prison life from the amount of garbage on the cellblock floor, to the meal schedule, to the number of times the inmates were allowed to shower. Unfortunately, all this evidence was presented in a case where the defense's reach hopelessly exceeded its grasp. Were we to hold, as respondents suggest, that the jury should be subjected to this potpourri even though a critical element of the proffered defenses was concededly absent, we undoubtedly would convert every trial under § 751 (a) into a hearing on the current state of the federal penal system.

Because the juries below were properly instructed on the *mens rea* required by § 751 (a), and because the respondents failed to introduce evidence sufficient to submit their defenses of duress and necessity to the juries, we reverse the judgments of the Court of Appeals.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE STEVENS, concurring.

The essential difference between the majority and the dissent is over the question whether the record contains enough evidence of a bona fide effort to surrender or return to custody to present a question of fact for the jury to resolve. On this issue, I agree with the Court that the evidence introduced by defendants Cooley, Bailey, and Cogdell was plainly insuffi-

cient. Vague references to anonymous intermediaries are so inherently incredible that a trial judge is entitled to ignore them. With respect to Walker, however, the question is much closer because he testified that he personally telephoned an FBI agent three times in an effort to negotiate a surrender.[1] But since he remained at large for about two months after his last effort to speak with the FBI, I am persuaded that even under his version of the facts he did not make an adequate attempt to satisfy the return requirement.

The fact that I have joined the Court's opinion does not indicate that I—or indeed that any other Member of the majority—is unconcerned about prison conditions described by MR. JUSTICE BLACKMUN. Because we are construing the federal escape statute, however, I think it only fair to note that such conditions are more apt to prevail in state or county facilities than in federal facilities.[2] Moreover, reasonable men may well differ about the most effective methods of redressing the situation. In my view, progress toward acceptable solutions involves formulating enforceable objective standards for civilized prison conditions,[3] keeping the channels of communication between prisoners and the outside world open,[4] and guaranteeing access to the courts,[5] rather than relying on ad hoc judgments about the good faith of

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[1] The rebuttal testimony described by the Court, *ante*, at 399, n. 2, indicates that Walker was probably not telling the truth; but in deciding whether Walker's testimony was sufficient, I assume its veracity.

[2] Compare, for example, *Hutto* v. *Finney*, 437 U. S. 678, with *Bell* v. *Wolfish*, 441 U. S. 520.

[3] See *Estelle* v. *Gamble*, 429 U. S. 97, 116–117 (STEVENS, J., dissenting).

[4] See *Houchins* v. *KQED, Inc.*, 438 U. S. 1, 19 (STEVENS, J., dissenting); *Jones* v. *North Carolina Prisoners' Union*, 433 U. S. 119, 138 (STEVENS, J., dissenting in part); *Morales* v. *Schmidt*, 489 F. 2d 1335, 1344 (CA7 1973) (Stevens, J., dissenting), modified, 494 F. 2d 85, 87 (CA7 1974) (en banc) (Stevens, J., concurring).

[5] See, *e. g.*, *Harris* v. *Pate*, 440 F. 2d 315 (CA7 1971). Cf. *Meachum* v. *Fano*, 427 U. S. 215, 229 (STEVENS, J., dissenting).

prison administrators,[6] giving undue deference to their "expertise" [7] or encouraging self-help by convicted felons.[8] In short, neither my agreement with much of what MR. JUSTICE BLACKMUN has written, nor my disagreement with the Court about related issues, prevents me from joining its construction of the federal escape statute.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court's opinion, it seems to me, is an impeccable exercise in undisputed general principles and technical legalism: The respondents were properly confined in the District of Columbia jail. They departed from that jail without authority or consent. They failed promptly to turn themselves in when, as the Court would assert by way of justification, *ante*, at 413, 415, the claimed duress or necessity "had lost its coercive force." Therefore, the Court concludes, there is no defense for a jury to weigh and consider against the respondents' prosecution for escape violative of 18 U. S. C. § 751 (a).

It is with the Court's assertion that the claimed duress or necessity had lost its coercive force that I particularly disagree. The conditions that led to respondents' initial departure from the D. C. jail continue unabated. If departure was justified—and on the record before us that issue, I feel, is for the jury to resolve as a matter of fact in the light of

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[6] See, *e. g.*, *Procunier* v. *Navarette*, 434 U. S. 555, 568 (STEVENS, J., dissenting).

[7] See *Bell* v. *Wolfish*, *supra*, at 584–585 (STEVENS, J., dissenting).

[8] It would be unwise, and perhaps counterproductive, to immunize escapes that would otherwise be unlawful in the hope that they would motivate significant reforms. "An unselfish motive affords no assurance that a crime will produce the results its perpetrator intends." *United States* v. *Cullen*, 454 F. 2d 386, 392, n. 17 (CA7 1971). Minimizing the risk of escape is, of course, the classic justification for imposing rigid discipline within prison walls.

the evidence, and not for this Court to determine as a matter of law—it seems too much to demand that respondents, in order to preserve their legal defenses, return forthwith to the hell that obviously exceeds the normal deprivations of prison life and that compelled their leaving in the first instance. The Court, however, requires that an escapee's action must amount to nothing more than a mere and temporary gesture that, it is to be hoped, just might attract attention in responsive circles. But life and health, even of convicts and accuseds, deserve better than that and are entitled to more than pious pronouncements fit for an ideal world.

The Court, in its carefully structured opinion, does reach a result that might be a proper one were we living in that ideal world, and were our American jails and penitentiaries truly places for humane and rehabilitative treatment of their inmates. Then the statutory crime of escape could not be excused by duress or necessity, by beatings, and by guard-set fires in the jails, for these would not take place, and escapees would be appropriately prosecuted and punished.

But we do not live in an ideal world "even" (to use a self-centered phrase) in America, so far as jail and prison conditions are concerned. The complaints that this Court, and every other American appellate court, receives almost daily from prisoners about conditions of incarceration, about filth, about homosexual rape, and about brutality are not always the mouthings of the purely malcontent. The Court itself acknowledges, *ante*, at 398, that the conditions these respondents complained about do exist. It is in the light of this stark truth, it seems to me, that these cases are to be evaluated. It must follow, then, that the jail-condition evidence proffered by respondent Cogdell should have been admitted, and that the jury before whom respondents Bailey, Cooley, and Walker were tried should not have been instructed to disregard the jail-condition evidence that did come in. I therefore dissent.

I

The atrocities and inhuman conditions of prison life in America are almost unbelievable; surely they are nothing less than shocking. The dissent in the *Bailey* case in the Court of Appeals acknowledged that "the circumstances of prison life are such that at least a colorable, if not credible, claim of duress or necessity can be raised with respect to virtually every escape." 190 U. S. App. D. C. 142, 167, 585 F. 2d 1087, 1112. And the Government concedes: "In light of prison conditions that even now prevail in the United States, it would be the rare inmate who could not convince himself that continued incarceration would be harmful to his health or safety." Brief for United States 27. See *Furtado* v. *Bishop*, 604 F. 2d 80 (CA1 1979), cert. denied, *post*, p. 1035. Cf. *Bell* v. *Wolfish*, 441 U. S. 520 (1979).

A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.[1] Weaker inmates become the property of stronger prisoners or gangs, who sell the sexual services of the victim. Prison officials either are disinterested in stopping abuse of prisoners by other prisoners or are incapable of doing so, given the limited resources society allocates to the prison system.[2] Prison officials often are merely indifferent to serious health and safety needs of prisoners as well.[3]

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[1] See, *e. g.*, C. Silberman, Criminal Violence, Criminal Justice 389 (1978); Report on Sexual Assaults in a Prison System and Sheriff's Vans, in 3 L. Radzinowicz & M. Wolfgang, eds., Crime and Justice 223–228 (2d ed. 1977).

[2] See generally Silberman, *supra*, at 379–382, 386–392; C. Bartollas, S. Miller, & S. Dinitz, Juvenile Victimization—The Institutional Paradox (1976); C. Weiss & D. Friar, Terror in the Prisons (1974); O. Ballesteros, Behind Jail Bars 26–27 (1979); M. Luttrell, Behind Prison Walls 64–65 (1974).

[3] *E. g.*, Weiss & Friar, *supra*, at 183–184 (youth having epileptic seizure sprayed with tear gas, resulting in severe trauma); G. Mueller, Medical Services in Prison: Lessons from Two Surveys, in CIBA Founda-

Even more appalling is the fact that guards frequently participate in the brutalization of inmates.[4] The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions.[5]

The evidence submitted by respondents in these cases fits that pattern exactly. Respondent Bailey presented evidence that he was continually mistreated by correctional officers during his stay at the D. C. jail. He was threatened that his testimony in the Brad King case would bring on severe retribution. App. 142, 145. Other inmates were beaten by guards as a message to Bailey. *Id.*, at 36. An inmate testified that on one occasion, three guards displaying a small knife told him that they were going "to get your buddy, that nigger Bailey. We're going to kill him." *Id.*, at 94. The threats culminated in a series of violent attacks on Bailey. Blackjacks, mace, and slapjacks (leather with a steel insert) were used in beating Bailey. *Id.*, at 94, 101, 146–150.

Respondent Cooley also elicited testimony from other inmates concerning beatings of Cooley by guards with slapjacks, blackjacks, and flashlights. *Id.*, at 46–47, 97–98, 106, 116–118,

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tion Symposium 16, Medical Care of Prisoners and Detainees 7, 11–16 (1973); J. Mitford, Kind & Usual Punishment 135 (1973); Univ. of Pa. Law School, Health Care and Conditions in Pennsylvania's State Prisons (1972), reprinted in ABA Comm'n on Correctional Facilities and Services, Standards and Materials on Medical and Health Care in Jails, Prisons, and Other Correctional Facilities 71 (1974); Report of the Medical Advisory Committee on State Prisons to Comm'r of Correction and Sec'y of Human Services, Commonwealth of Mass. (1971), reprinted in ABA Standards and Materials 89.

[4] See, *e. g.*, Weiss & Friar, *supra*, at 54–60, 163–164, 176–181, 188, 199–200, 222.

[5] See, *e. g.*, Note, Escape From Cruel and Unusual Punishment: A Theory of Constitutional Necessity, 59 B. U. L. Rev. 334, 358–360 (1979); *Landman* v. *Royster*, 333 F. Supp. 621, 633–634 (ED Va. 1971); *Sostre* v. *Rockefeller*, 312 F. Supp. 863, 869 (SDNY 1970), rev'd in part, modified in part, aff'd in part *sub nom. Sostre* v. *McGinnis*, 442 F. 2d 178 (CA2 1971) (en banc), cert. denied *sub nom. Sostre* v. *Oswald*, 404 U. S. 1049 (1972); Mitford, *supra*, at 260–262.

166–167, 185–186. There was evidence that guards threatened to kill Cooley. *Id.*, at 107.

It is society's responsibility to protect the life and health of its prisoners. "[W]hen a sheriff or a marshall [*sic*] takes a man from the courthouse in a prison van and transports him to confinement for two or three or ten years, *this is our act. We* have tolled the bell for him. And whether we like it or not, we have made him our collective responsibility. We are free to do something about him; he is not" (emphasis in original). Address by THE CHIEF JUSTICE, 25 Record of the Assn. of the Bar of the City of New York 14, 17 (Mar. 1970 Supp.). Deliberate indifference to serious and essential medical needs of prisoners constitutes "cruel and unusual" punishment violative of the Eighth Amendment. *Estelle* v. *Gamble*, 429 U. S. 97, 104 (1976).

> "An inmate must rely on prison authorities to treat his medical needs. . . . In the worst cases, such a failure may actually produce physical 'torture or a lingering death'. . . . In less serious cases, denial of medical care may result in pain and suffering which no one suggests would serve any penological purpose. . . . The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency." *Id.*, at 103.

It cannot be doubted that excessive or unprovoked violence and brutality inflicted by prison guards upon inmates violates the Eighth Amendment. See, *e. g.*, *Jackson* v. *Bishop*, 404 F. 2d 571 (CA8 1968). The reasons that support the Court's holding in *Estelle* v. *Gamble* lead me to conclude that failure to use reasonable measures to protect an inmate from violence inflicted by other inmates also constitutes cruel and unusual punishment. Homosexual rape or other violence serves no penological purpose. Such brutality is the equivalent of torture, and is offensive to any modern standard of human dignity. Prisoners must depend, and rightly so, upon the prison administrators for protection from abuse of this kind.

There can be little question that our prisons are badly overcrowded and understaffed and that this in large part is the cause of many of the shortcomings of our penal systems. This, however, does not excuse the failure to provide a place of confinement that meets minimal standards of safety and decency.

Penal systems in other parts of the world demonstrate that vast improvement surely is not beyond our reach. "The contrast between our indifference and the programs in some countries of Europe—Holland and the Scandinavian countries in particular—is not a happy one for us." Address by THE CHIEF JUSTICE, *supra*, at 20. "It has been many years since Swedish prisoners were concerned with such problems as 'adequate food, water, shelter'; 'true religious freedom'; and 'adequate medical treatment.'" Ward, Inmate Rights and Prison Reform in Sweden and Denmark, 63 J. Crim. L., C. & P. S. 240 (1972). See also Profile/Sweden, Corrections Magazine 11 (June 1977). Sweden's prisons are not overcrowded, and most inmates have a private cell. Salomon, Lessons from the Swedish Criminal Justice System: A Reappraisal, 40 Fed. Probation 40, 43 (Sept. 1976). The prisons are small. The largest accommodate 300–500 inmates; most house 50–150. *Id.*, at 43; Profile/Sweden, *supra*, at 14. "There appears to be a relaxed atmosphere between staff and inmates, and a prevailing attitude that prisoners must be treated with dignity and respect." Siegel, Criminal Justice—Swedish Style: A Humane Search for Answers, 1 Offender Rehabilitation 291, 292 (1977).

II

The real question presented in this case is whether the prisoner should be punished for helping to extricate himself from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions such as beatings, fires, lack of essential medical care, and sexual attacks. To be sure, Congress in so

many words has not enacted specific statutory duress or necessity defenses that would excuse or justify commission of an otherwise unlawful act. The concept of such a defense, however, is "anciently woven into the fabric of our culture." J. Hall, General Principles of Criminal Law 416 (2d ed. 1960), quoted in Brief for United States 21. And the Government concedes that "it has always been an accepted part of our criminal justice system that punishment is inappropriate for crimes committed under duress because the defendant in such circumstances cannot fairly be blamed for his wrongful act." *Id.*, at 23.

Although the Court declines to address the issue, it at least implies that it would recognize the common-law defenses of duress and necessity to the federal crime of prison escape, if the appropriate prerequisites for assertion of either defense were met. See *ante*, at 410–413. Given the universal acceptance of these defenses in the common law, I have no difficulty in concluding that Congress intended the defenses of duress and necessity to be available to persons accused of committing the federal crime of escape.

I agree with most of the Court's comments about the essential elements of the defenses. I, too, conclude that intolerable prison conditions are to be taken into account through affirmative defenses of duress and necessity, rather than by way of the theory of intent espoused by the Court of Appeals. That court's conclusion that intent to avoid the *normal* aspects of confinement is an essential element of the offense of escape means that the burden of proof is on the Government to prove that element. According to our precedents, *e. g.*, *Mullaney* v. *Wilbur*, 421 U. S. 684 (1975), the Government would have to prove that intent beyond a reasonable doubt. It is unlikely that Congress intended to place this difficult burden on the prosecution. The legislative history is sparse, and does not specifically define the requisite intent. Circumstances that compel or coerce a person to

commit an offense, however, traditionally have been treated as an affirmative defense, with the burden of proof on the defendant. Although intolerable prison conditions do not fit within the standard definition of a duress or necessity defense, see 190 U. S. App. D. C., at 151–152, n. 29, 585 F. 2d, at 1096–1097, n. 29, they are analogous to these traditional defenses. I therefore agree that it is appropriate to treat unduly harsh prison conditions as an affirmative defense.

I also agree with the Court that the absence of reasonable less drastic alternatives is a prerequisite to successful assertion of a defense of necessity or duress to a charge of prison escape. One must appreciate, however, that other realistic avenues of redress seldom are open to the prisoner. Where prison officials participate in the maltreatment of an inmate, or purposefully ignore dangerous conditions or brutalities inflicted by other prisoners or guards, the inmate can do little to protect himself. Filing a complaint may well result in retribution, and appealing to the guards is a capital offense under the prisoners' code of behavior.[6] In most instances, the question whether alternative remedies were thoroughly "exhausted" should be a matter for the jury to decide.

I, too, conclude that the jury generally should be instructed that, in order to prevail on a necessity or duress defense, the defendant must justify his continued absence from custody, as well as his initial departure. I agree with the

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[6] See, *e. g.*, R. Goldfarb, Jails: The Ultimate Ghetto 325–326 (1975) (Official of Oklahoma Crime Commission describes gang rape and concludes: "[if the kid tells the guards] . . . his life isn't worth a nickel"); *State* v. *Green*, 470 S. W. 2d 565, 569 (Mo. 1971) (dissenting opinion), cert. denied, 405 U. S. 1073 (1972).

The alleged facts in this case appear to be typical. Respondent Bailey filed suit in the Superior Court of the District of Columbia to "stop the administrators from threatening my life." App. 176. Bailey testified that the suit caused the guards to threaten him in an attempt to persuade him to withdraw the action, to beat him, and to transfer him to the mental ward. *Id.*, at 154–155. Bailey's suit subsequently was dismissed with prejudice. Brief for Respondents 15–16, n. 7.

Court that the very nature of escape makes it a continuing crime. But I cannot agree that the only way continued absence can be justified is by evidence "of a bona fide effort to surrender or return to custody." *Ante*, at 413, 415. The Court apparently entertains the view, naive in my estimation, that once the prisoner has escaped from a life- or health-threatening situation, he can turn himself in, secure in the faith that his escape somehow will result in improvement in those intolerable prison conditions. While it may be true in some rare circumstance that an escapee will obtain the aid of a court or of the prison administration once the escape is accomplished, the escapee, realistically, faces a high probability of being returned to the same prison and to exactly the same, or even greater, threats to life and safety.

The rationale of the necessity defense is a balancing of harms. If the harm caused by an escape is less than the harm caused by remaining in a threatening situation, the prisoner's initial departure is justified. The same rationale should apply to hesitancy and failure to return. A situation may well arise where the social balance weighs in favor of the prisoner even though he fails to return to custody. The escapee at least should be permitted to present to the jury the possibility that the harm that would result from a return to custody outweighs the harm to society from continued absence.

Even under the Court's own standard, the defendant in an escape prosecution should be permitted to submit evidence to the jury to demonstrate that surrender would result in his being placed again in a life- or health-threatening situation. The Court requires return to custody once the "claimed duress or necessity had lost its coercive force." *Ante*, at 413, 415. Realistically, however, the escapee who reasonably believes that surrender will result in return to what concededly is an intolerable prison situation remains subject to the same "coercive force" that prompted his escape in the first instance. It is ironic to say that that force is automatically "lost" once the prison wall is passed.

The Court's own phrasing of its test demonstrates that it is deciding factual questions that should be presented to the jury. It states that a "bona fide" effort to surrender must be proved. *Ibid.* Whether an effort is "bona fide" is a jury question. The Court also states that "[v]ague and necessarily self-serving statements of defendants or witnesses as to future good intentions or ambiguous conduct simply do not support a finding of this element of the defense." *Ante,* at 415. Traditionally, it is the function of the jury to evaluate the credibility and meaning of "necessarily self-serving statements" and "ambiguous conduct." See *People* v. *Luther,* 394 Mich. 619, 232 N. W. 2d 184 (1975); *People* v. *Unger,* 66 Ill. 2d 333, 362 N. E. 2d 319 (1977); *Esquibel* v. *State,* 91 N. M. 498, 576 P. 2d 1129 (1978).

Finally, I of course must agree with the Court that use of the jury is to be reserved for the case in which there is sufficient evidence to support a verdict. I have no difficulty, however, in concluding that respondents here did indeed submit sufficient evidence to support a verdict of not guilty, if the jury were so inclined, based on the necessity defense. Respondent Bailey testified that he was in fear for his life, that he was afraid he would still face the same threats if he turned himself in, and that "[t]he FBI was telling my people that they was going to shoot me." App. 176.[7] Respondent

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[7] "Q Why didn't you surrender yourself?

"A I was in fear of my life. I know that if I turned myself in I would still be under the threats of death. Always knew that the FBI wanted to kill me, after I escaped, so I was in limbo. I didn't know what to do. I did have some people call to the officials at the jail on several occasions.

"Q Let me ask you a question: You stated that you never surrendered yourself, because you were still fearful of the threats?

"A That is right.

"Q Did you understand where you would be returned to?

"A Yes, sir.

"Q Where?

Cooley testified that he did not know anyone to call, and that he feared that the police would shoot him when they came to get him. *Id.*, at 119.[8] Respondent Walker testified that he had been in "constant rapport," *id.*, at 195, with an FBI agent, who assured him that the FBI would not harm him, but who would not promise that he would not be returned to the D. C. jail. *Id.*, at 200. Walker also stated

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"A The new detention center, 1901 D Street, Southeast.
"Q What section?
"A Northeast 1.
"Q Did you know who the guards would be?
"A The same officers that was there before I left.
"Q Did you ever hear that the FBI was looking for you?
"A Yes, I did.
"Q Didn't you feel that you could tell the FBI that you didn't want to return to the D. C. Jail in Northeast 1?
"A No. The FBI was telling my people that they was going to shoot me." App. 175–176.

[8] "Q Once you left the jail, Mr. Cooley, did you make any attempt to notify anybody in authority to say you were out and did you make any attempt to notify anybody that you were out?
"A Yeah.
"Q To whom?
"A Like I ain't do it per se. But, like when I went home, you know, my people called and I told them that I had, I told them what happened. Why I had done it. They was mad. I told them why I had done it. They understood, but they called and never got in touch with anybody.
"Q Did you ever make any attempt to call anybody, yourself?
"A I don't know nobody to call. I'm thinking like this here: They don't like me in the jail. Ain't nobody I can call.
"Q Why did you not call anybody at the jail?
"A For what?
"Q Did you feel that there would be any purpose in doing that?
"A It wouldn't have been none. They probably came and got me, and then make me try to run and they shoot me in half when they come and get me.
"Q So you feared for your life. You could not call for that reason?
"A That is right.
"Q Did you ever leave Washington, D. C., after you left the jail?
"A No." *Id.*, at 119.

that he had heard through his sister that the FBI "said that if they ran down on me they was going to kill me." *Id.*, at 195.[9]

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[9] The defendant Walker:

"Now, there is one more issue that I want to briefly touch on here and that is the fact that after I was released from the detention facility I did in fact contact the proper authorities. I contacted the FBI on a number of occasions. As a matter of fact I kept a constant rapport with the FBI. I had people who had told me that they had brought this information to my sisters that the FBI said that if they ran down on me they was going to kill me. So, in actuality I was never out of immediate danger. I was never out of immediate threat of losing my life. If I would have given myself up I had this FBI threat to contend with and I also had to go back over to the same jail that I had just left from, and this was the reason that I consequently never turned myself into the authorities. That is my testimony.

. . . . .

"CROSS-EXAMINATION

"Q Mr. Walker, do you know the names of the individuals in the FBI that you retained this constant rapport with during the course of your escape?

"A One of them was an Officer Troy or Fauntroy, or something of that nature. I don't know if that is his exact name or not.

"Q When did you call him, sir?

"A I called him the second day after I was out, and after that I had occasion to call him on several different occasions.

"Q Did you identify yourself at those times?

"A Yes, I identified myself.

"Q Did you indicate where you were?

"A No, I didn't indicate where I was.

"Q Did you tell him that you were going to surrender yourself?

"A I told him that I would surrender myself if I wasn't being subjected to the same conditions and put on the same penitentiary that I had just left from.

"Q How many days did you call this gentleman?

"A I don't know. I called him two or three different times during the period that I was in the streets.

"Q You were out until December 13th, is that correct?

"A I think that is the date.

. . . . .

Perhaps it is highly unlikely that the jury would have believed respondents' stories that the FBI planned to shoot them on sight, or that respondent Walker had been in con-

"Q Now, sir, where did you make the phone call from to the FBI?

"A I made the first one from a public phone booth.

"Q How did you know what number to call, sir? Did you look it up in the directory?

"A I looked it up in the directory.

"Q Did you ask for anybody in particular at the FBI?

"A No, I just asked to speak to someone on the warrant squad or someone who was connected with escapees.

"Q Would the name Fluharty, does that ring a bell? Would that name Fluharty ring a bell with you as the name of a gentleman you may have spoken to, if you spoke to someone?

"A Sounds halfway familiar.

"Q Exactly what did you tell him, sir?

"A I explained to him that I was one of the four gentlemen that had escaped from the detention facility on August 26th, because of the conditions that existed there.

"I explained to him how terminal the conditions were there and asked him was it any kind of way that I could get with him to make some type of arrangements as far as turning myself in, if I wouldn't have to go back to the detention facility at 1901 D Street, Southeast and also asked him had there been anything issued concerning, or had he told a man named Earl Berman, whether or not the FBI—or, did he have knowledge that anybody at the FBI had told Mr. Earl Berman that he had intended to kill me if I was arrested.

"Q Who is Earl Berman, sir?

"A Earl Berman is a personal friend of mine.

"Q Are you saying that Mr. Berman told you that the FBI was going to kill you?

"A Yes, he did. He didn't tell me, but he told my sister and my sister related this information to me.

"Q So, you heard it third-hand?

"A Yes, I heard it second-hand.

. . . . .

"BY MR. SCHAARS:

. . . . .

"Q Now, sir, when exactly was the first time that you called Agent Fluharty or someone by the name of Fauntroy with the FBI?

[*Footnote 9 is continued on p. 432*]

stant communication with an FBI agent. Nevertheless, such testimony, even though "self-serving," and possibly extreme and unwarranted in part, was sufficient to permit the jury to decide whether the failure to surrender immediately was jus-

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"A The second day I was out.

"Q Would that be on the 28th, sir?

"A That would be on the 28th.

"Q Do you recall about what time of day it was, sir?

"A I don't know. It was in the early morning hours. I would say have to be between 4:00 and 6:00.

"Q A. M., sir?

"A A. M.

"Q And, do you know [how] long your conversation lasted at that point?

"A It had—no longer than a three-minute duration at the most.

"Q And you did identify yourself?

"A I did identify myself.

"Q When was the second time that you spoke to somebody from the FBI?

"A Approximately a week and a half later.

"Q Would it be fair to say that that would be about ten days later, sir?

"A I think that would be fair.

"Q To whom did you speak at that time?

"A To the same person.

"Q Did you ask for him at that time, sir or—

"A Yes, I did. I had called the FBI building previous to that, told them that I was going to call.

"Q Do you recall what time of day you called at that time, sir?

"A It was about 2:00 in the afternoon.

"Q How long did your conversation take at that time?

"A No more than a three-minute duration then.

"Q Did you identify yourself, sir?

"A Yes, I identified myself.

"Q At that time did you indicate to Agent Fluharty that you were going to turn yourself in?

"A I indicated to him if he could work out the conditions for which I wanted to turn myself in, I would turn myself in.

"Q What were the conditions?

"A Those conditions would be the fact that I wouldn't be harmed by

tified or excused. This is routine grist for the jury mill and the jury usually is able to sort out the fabricated and the incredible.

In conclusion, my major point of disagreement with the Court is whether a defendant may get his duress or necessity

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any agent of the FBI, I wouldn't be taken back to the detention facility, 1901 D Street, Southeast.

"Q Did there come a time that you spoke to somebody from the FBI again?

"A Yes, there did.

"Q When was that, sir?

"A I would say that would have been about a month later.

"Q Would that be mid-October, sir, or late October or mid-November? I'm sorry, I don't mean to confuse you.

"A It was in—it was in October. I don't know whether it was late or—It was around—it was in October, around, between the middle and first part of October.

"Q Now, whom did you speak to at that time, sir?

"A The same guy.

"Q Agent Fluharty?

"A I assume that is his name.

"Q It was somebody on the warrant or escape squad that you were speaking to each time, sir?

"A I assume that he was.

"Q Did you ask specifically for somebody on that squad the first time you called?

"A The first time I called I did.

"Q And the second time, did you ask for the same agent by name?

"A Yes, I did.

"Q And the third time, did you ask for the same agent by name?

"A Yes.

"Q Now, sir, on that third occasion did you offer to come down and turn yourself in?

"A Under certain specified conditions.

"Q The same conditions as you have indicated on the two prior occasions?

"A The very same conditions.

"Q Now, sir, did there come a time when you called the FBI again?

"A To my recollection, no.

"Q So, from the beginning to the middle of October, whenever that

defense to the jury when it is supported only by "self-serving" testimony and "ambiguous conduct." It is difficult to imagine any case, criminal or civil, in which the jury is asked

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third phone call occurred, to December 13th, you had no contact with the FBI?

"A To my recollection, no.

"Q Did you call any other law enforcement agency during that period of time, sir?

"A No, I didn't.

"Q Did you ever appear in any court of the District of Columbia to turn yourself in during that period of time?

"A No, I didn't.

"Q Did you ever talk to a minister or a priest or any kind of religious leader in an effort to turn yourself in during that period of time?

"A Yes, I did. I'm a minister myself.

"Q You are, sir? Did you speak to another member of your faith, a minister?

"A Yes, I did.

"Q To whom did you speak, sir?

"A I don't want to give his name at this time. I don't want to incriminate him as far as anything, as far as my escape and everything is concerned. You'd have him up here for a charge.

"Q Did you tell that gentleman that you were going to turn yourself in?

"A I told him—I had discussed turning myself in with a member of the FBI and I thought very seriously about it, if the conditions that I had specified to you could be worked out.

"Q When you spoke to this gentleman from the FBI, did he ever indicate that he would agree to those conditions?

"A No, he didn't.

"Q Did he indicate that he would agree with anything?

"A He indicated that he would agree that I wouldn't be harmed by any members of the Federal Bureau of Investigation, but that he couldn't agree that I wouldn't be taken back to the detention facility, 1901 D Street.

"Q So, he did promise you that the FBI wasn't going to hurt you?

"A Yes, he told me that the FBI wouldn't hurt me.

"Q Did you have any contact with a warrant squad officer of the District of Columbia Department of Corrections during your period of elopment [*sic*]?

"A Not to my recollection, unless he is part of that warrant squad." App. 195–200.

to decide a factual question based on completely disinterested testimony and unambiguous actions. The very essence of a jury issue is a dispute over the credibility of testimony by interested witnesses and the meaning of ambiguous actions.

Ruling on a defense as a matter of law and preventing the jury from considering it should be a rare occurrence in criminal cases. "[I]n a criminal case the law assigns [the fact-finding function] solely to the jury." *Sandstrom* v. *Montana*, 442 U. S. 510, 523 (1979). The jury is the conscience of society and its role in a criminal prosecution is particularly important. *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968). Yet the Court here appears to place an especially strict burden of proof on defendants attempting to establish an affirmative defense to the charged crime of escape. That action is unwarranted. If respondents' allegations are true, society is grossly at fault for permitting these conditions to persist at the D. C. jail. The findings of researchers and government agencies, as well as the litigated cases, indicate that in a general sense these allegations are credible.[10] The case for recognizing the duress or necessity defenses is even more compelling when it is society, rather than private actors, that creates the coercive conditions. In such a situation it is especially appropriate

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[10] In addition to the sources cited above, see American Assembly, Prisoners in America (1973); S. Sheehan, A Prison and a Prisoner (1978); V. Williams & M. Fish, Convicts, Codes, and Contraband (1974); Inside—Prison American Style (R. Minton, ed. 1971); T. Murton, The Dilemma of Prison Reform (1976); American Friends Service Committee, Struggle for Justice, A Report on Crime and Punishment in America (1971); Behind Bars: Prisoners in America (R. Kwartler ed. 1977); B. Bagdikian & L. Dash, The Shame of the Prisons (1972); Note, 13 Ga. L. Rev. 300 (1978); Note, Intolerable Conditions as a Defense to Prison Escapes, 26 UCLA L. Rev. 1126 (1979); Comment, 127 U. Pa. L. Rev. 1142 (1979); Note, 54 Chi.-Kent L. Rev. 913 (1978); Comment, 26 Buffalo L. Rev. 413 (1977); Plotkin, Surviving Justice: Prisoners' Rights To Be Free from Physical Assault, 23 Cleve. St. L. Rev. 387 (1974); Note, 45 S. Cal. L. Rev. 1062 (1972); Note, 36 Albany L. Rev. 428 (1972).

that the jury be permitted to weigh all the factors and strike the balance between the interests of prisoners and that of society. In an attempt to conserve the jury for cases it considers truly worthy of that body, the Court has ousted the jury from a role it is particularly well suited to serve.

ESTES ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78–253. Argued October 29, 1979—Decided January 21, 1980*

Certiorari dismissed. Reported below: 572 F. 2d 1010.

Warren Whitham argued the cause for petitioners in No. 78–253. With him on the brief was *Mark Martin*. *Robert L. Blumenthal* argued the cause for petitioners in No. 78–282. With him on the briefs was *Robert H. Mow, Jr.* *James A. Donohoe* argued the cause and filed a brief for petitioners in No. 78–283.

E. Brice Cunningham argued the cause for respondents Metropolitan Branches of the Dallas NAACP et al. With him on the brief were *Nathaniel R. Jones, Merle W. Loper,* and *Louis R. Lucas.* *Edward B. Cloutman III* argued the cause for respondents Tasby et al. With him on the brief were *Jack Greenberg, James M. Nabrit III,* and *Bill Lann Lee.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General McCree, Assistant Attorney General Days, Sara Sun Beale, Brian K. Landsberg,* and *Mildred M. Matesich.*†

PER CURIAM.

The writs of certiorari are dismissed as improvidently granted.

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*Together with No. 78–282, *Curry et al.* v. *Metropolitan Branches of the Dallas NAACP et al.*; and No. 78–283, *Brinegar et al.* v. *Metropolitan Branches of the Dallas NAACP et al.*, also on certiorari to the same court.

†*H. Ron White* filed a brief for the Dallas Alliance et al. as *amici curiae* urging reversal in all cases.

MR. JUSTICE MARSHALL took no part in the consideration or decision of these cases.

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, dissenting.

The Court today dismisses the writs previously granted in this litigation and thereby reinstates the ruling of the Court of Appeals. The suit now will be returned to the District Court for elaboration of that court's conclusions on the feasibility of extensive busing to achieve racial balance in the Dallas public schools. The Court of Appeals directed the trial court to supplement the record with formal studies of the anticipated times and distances of likely bus routes, and to make additional findings on desegregation in the city's high schools.

Although the remand is narrow, aimed solely at the sufficiency of the record on which the District Court based its desegregation order, I do not think it is justified. After studying the schools of the Dallas Independent School District through the many years of this litigation, the trial judge drew on his familiarity with Dallas and its schools, and on the advice of many community groups, to fashion an effective and fair desegregation order. The Court of Appeals failed to accord proper deference to the District Court's conscientious execution of this delicate task.

In addition, this case presents a long-needed opportunity to re-examine the considerations relevant to framing a remedy in a desegregation suit. It is increasingly evident that use of the busing remedy to achieve racial balance can conflict with the goals of equal educational opportunity and quality schools. In all too many cities, well-intentioned court decrees have had the primary effect of stimulating resegregation. The experience in Dallas during this litigation presents a striking illustration of this problem. If the District Court orders substantial additional busing, as the Court of Appeals ap-

parently thinks it should, recent history suggests that the Dallas school district will be well on the road to the "separate but equal" conditions mistakenly approved in *Plessy* v. *Ferguson*, 163 U. S. 537 (1896). Such an outcome is no less real or less regrettable when caused by courts with benign motives. The promise of *Brown* v. *Board of Education*, 347 U. S. 483 (1954), cannot be fulfilled by continued imposition of self-defeating remedies.

I

The Dallas Independent School District (School District) has been in desegregation litigation since 1955, although the present case is not part of the original suit. During this quarter of a century, the School District has grown into the eighth largest school district in the country, covering 351 square miles and spanning 35 miles at its widest point. Since the present action first was tried in 1971, the student population of the district has changed dramatically. Total enrollment has dropped from 163,000 to 133,000, while the racial distribution of students has shifted from 69% Anglo in 1971 to 33.5% Anglo, 49.1% black, and 16.3% Mexican-American in 1979. There were 112,000 Anglo students in the School District in 1970; there are now fewer than 45,000.

This suit was brought by several parents, acting on behalf of their children, against the superintendent and the Board of Trustees of the School District (Board). Other parents groups have intervened in the suit.[1] In the summer of 1971, the District Court found that "elements" of a segregated school system "still remain" in the Dallas schools. *Tasby* v. *Estes*, 342 F. Supp. 945, 947 (ND Tex. 1971). The court imposed a number of remedies, including the busing of approx-

[1] The original plaintiffs, respondents here, represent a class of black and Mexican-American students. The Curry petitioners represent a group of North Dallas pupils, and the Brinegar petitioners represent a class of persons living in an integrated area of East Dallas.

imately 15,000 students. The original plaintiffs appealed to the Court of Appeals for the Fifth Circuit for more extensive reassignment and transportation of pupils. That court declared that "nothing less than the elimination of predominantly one-race schools is constitutionally required. . . ." *Tasby* v. *Estes*, 517 F. 2d 92, 103, cert. denied, 423 U. S. 939 (1975). Finding that the District Court's decree failed to satisfy this standard, the Court of Appeals remanded for the formulation of a new desegregation plan.

In a month-long trial on remand, the District Court considered in detail six plans submitted by the various parties and a court-appointed expert. It heard nearly 50 witnesses, including numerous experts, and produced a trial transcript of some 4,000 pages. The court also conferred with concerned community groups, the most prominent of which was the Educational Task Force of the Dallas Alliance (Alliance), a multiracial, nonpartisan organization.[2] In a thorough opinion, *Tasby* v. *Estes*, 412 F. Supp. 1192 (ND Tex. 1976), the District Court found that the decline in Anglo enrollment between 1971 and 1976 was not the result of actions taken by the Board. In fact, the court noted the Board's continuing "good faith" efforts to establish a unitary school system. *Id.*, at 1207. See *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S. 424, 435–436 (1976). The court's duty, it asserted, was to adopt a plan that would "realistically and effectively"

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[2] The Task Force consisted of seven Mexican-Americans, seven Anglos, six blacks, and one American Indian. The Dallas Alliance comprises 77 cooperating organizations, including local branches of the AFL–CIO and the Chamber of Commerce, religious groups, civic organizations, and several local chapters of the NAACP. The Alliance Task Force proposed a comprehensive desegregation plan that largely was adopted by the District Court. Of course, a group's participation in the Alliance need not signify approval of the desegregation plan proposed by the Educational Task Force, but the Alliance clearly has many ties to the entire Dallas community.

achieve desegregation in light of demographic changes in the School District. 412 F. Supp., at 1207.

With careful attention to the special characteristics and history of the School District, the District Court promulgated a progressive and comprehensive plan that drew heavily on the proposals of the Alliance.[3] For purposes of student assignment, the plan divides the School District into six subdistricts. In integrated areas within each subdistrict, present student assignments are retained wherever possible. In other areas, children in grades K–3 remain in neighborhood schools; those in grades 4–8 are assigned to central schools in each subdistrict; and high school students are assigned to schools in their own subdistricts on the basis of geographical attendance zones. The plan provides for a number of "magnet high schools" that offer enriched educational programs.[4] The pupil assignment plan is supplemented by majority-to-minority transfers upon request.[5]

This case now focuses on student assignment and busing.[6]

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[3] In a brief *amicus curiae* to the Court, the Alliance stated that the plan submitted by its Educational Task Force "reflects compromise" and was reached by consensus. Brief for Dallas Alliance as *Amicus Curiae* 21.

[4] The District Court ordered the School District to establish seven new magnet high schools by 1979. Each must offer special career training, and the racial makeup of each school must be within 10% of the racial distribution of the School District's high school population. *Tasby* v. *Estes*, 412 F. Supp. 1192, 1215–1216 (ND Tex. 1976). Free transportation is available for students at magnet schools.

[5] The Court of Appeals correctly determined that the District Court's plan is deficient in not explicitly providing transportation at public expense to children who exercise this option. *Tasby* v. *Estes*, 572 F. 2d 1010, 1015 (CA5 1978).

[6] The initial District Court ruling also dealt, apparently to the satisfaction of the plaintiffs, with staff desegregation, school construction, bilingual education for Mexican-Americans, and other programs designed to supplement the opportunities of minority students. *Tasby* v. *Estes*, 342 F. Supp. 945, 953 (ND Tex. 1971). These matters are no longer issues in this litigation.

Each of the six plans considered by the District Court provided for substantial busing.[7] Although the court did not estimate the number of pupils to be bused under its decree, the Alliance proposal which paralleled the court's plan anticipated the busing of some 20,000 students. The court concluded that the racial composition of the student population in each subdistrict "will approximate the racial makeup of the [district] as a whole, with the exception of [East] Oak Cliff," a black neighborhood. *Id.*, at 1204.

Respondents argue that the District Court's plan leaves 62 schools, about one-third of the 176 schools in the district, with "one-race" student bodies (defined as those where more than 75% of the students are of one race).[8] Fifty-two of these schools would be predominantly black, nine Anglo, and one Mexican-American. A majority of these one-race schools result from the District Court's refusal to bus very young children.[9] This Court has recognized that concern for the health and welfare of younger children may dictate their exclusion from student transportation plans, see *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S. 1, 31 (1971), and respondents do not dispute that feature of the District Court order. In addition, several high schools have one-race student bodies because the District Court declined to order the busing of high school students. It noted that "of approximately 1,000 Anglos ordered to be transported to formerly all-black high schools under this Court's 1971 student assignment plan, fewer than 50 Anglo students attend those schools today." 412 F. Supp., at 1205. The court

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[7] The estimates of the number of students to be bused ranged from 14,000 under the plan originally proposed by the Board to 69,000 under the NAACP plaintiffs' Plan A.

[8] Tr. of Oral Arg. 46.

[9] In their brief to this Court, the NAACP respondents concede that more than half of the one-race schools are in the elementary grade, K–3 category. Brief for Respondents NAACP et al. 9.

also concluded that the establishment of magnet high schools was the "most realistic, feasible, and effective method for eliminating the remaining vestiges of a dual [school] system on the 9–12 level. . . ." *Ibid.*

Viewed on a geographic basis, the order left 28 "predominantly black" schools in East Oak Cliff, which is bounded by the Trinity River bottom on one side and by Interstate 35 on the other. The court found that the "practicalities of time and distance" prevent the effective integration of the schools in this neighborhood through busing. *Id.*, at 1204. In contrast, the Seagoville subdistrict remains predominantly white. Seagoville, however, is "geographically isolated" from the rest of the city, *Tasby* v. *Estes*, 572 F. 2d 1010, 1013 (CA5 1978), and its school population represents less than 2% of the School District's student body.

The Court of Appeals was not impressed by the District Court's carefully structured plan. It concentrated almost exclusively on the "large number of one-race schools" remaining in Dallas. *Id.*, at 1012.

> "We cannot properly review any student assignment plan that leaves many schools in a system one race without specific findings by the district court as to the feasibility of [student assignment] techniques. . . . There are no adequate time-and-distance studies in the record in this case. Consequently, we have no means of determining whether the natural boundaries and traffic considerations preclude either the pairing and clustering of schools or the use of transportation to eliminate the large number of one-race schools still existing." *Id.*, at 1014.

The Court of Appeals remanded "for the formulation of a new student assignment plan and for findings to justify the maintenance of *any* one-race schools that may be part of that plan." *Id.*, at 1018 (emphasis added).

II

The duration and complexity of this litigation demonstrate the difficulty of providing effective relief in a school desegregation case. The school board and the court must consider many economic, social, and educational factors, and those factors vary widely from community to community. Courts frequently are caught between the constitutional prohibition against segregation and the severe limitations on their ability to implement an effective plan with public support. See *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449, 486–488 (1979) (POWELL, J., dissenting). Consequently, this Court has been reluctant to give more than general instructions for desegregation orders, and those instructions have not always been completely consistent.[10] The result in too many instances has been confusion in the lower courts. See *infra*, at 449–450.

I believe that two rules provide the basic outline for responsible exercise of the courts' equitable powers in school desegregation cases. First, "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977) (*Milliken II*). The constitutional deprivation must be identified accurately, and the remedy must be related closely to that deprivation. Otherwise, a desegregation order may exceed both the power and the competence of courts. Second, "[t]he measure of any desegregation plan is its effectiveness." *Davis* v. *School Comm'rs of Mobile County*, 402 U. S. 33, 37 (1971). A court must act decisively to remove purposeful segregation, but it also must avoid the danger of inciting resegregation by unduly disrupting the public schools.

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[10] See Yudof, School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court, 42 Law & Contemp. Prob. 57, 87–102 (Autumn 1978).

Much of the confusion that has plagued this litigation derives from neglect of these principles. The District Court failed to identify the link between the constitutional violation and the desegregation remedy, and the Court of Appeals showed little concern for either that problem or the question of effectiveness. Unless courts carefully consider those issues, judicial school desegregation will continue to be a haphazard exercise of equitable power that can, "like a loose cannon, . . . inflict indiscriminate damage" on our schools and communities.[11]

A

The opinion of the Court of Appeals focuses almost entirely on the one-race schools remaining in the School District. This preoccupation apparently derives from the oft-repeated language in *Green* v. *County School Board*, 391 U. S. 430, 442 (1968), that desegregation must create "a system without a 'white' school [or] a 'Negro' school." As I have noted before, this language was suitable to the small rural county before the Court in that case, where there were only two schools and 1,300 schoolchildren of both races scattered throughout the county. But it makes no sense to apply that statement to the Dallas Independent School District or any major metropolitan school district. In large cities, the principal cause of segregation in the schools is residential segregation, which results largely from demographic and economic conditions over which school authorities have no control. *E. g.*, *Pasadena City Bd. of Education* v. *Spangler*, 427 U. S., at 435–437; see *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U. S. 189, 222–223 (1973) (POWELL, J., concurring in part and dissenting in part).[12] In cases since *Green*, the Court has stated ex-

[11] The language quoted comes from MR. JUSTICE STEWART's dissenting opinion in *Stump* v. *Sparkman*, 435 U. S. 349, 367 (1978).

[12] See Coleman, New Incentives for Desegregation, 7 Human Rights 10, 11 (Fall 1978); Farley, Residential Segregation and Its Implications for School Integration, 39 Law & Contemp. Prob. 164 (Winter 1975).

plicitly that the existence of "predominantly white or predominantly black [schools,] without more, . . . does not offend the Constitution." *Dayton Bd. of Education* v. *Brinkman*, 433 U. S. 406, 417 (1977); *Milliken II*, *supra*, at 280, n. 14; *Swann* v. *Charlotte-Mecklenburg Bd. of Education*, 402 U. S., at 26.[13] It is puzzling that many trial and appellate courts continue to misapply *Green* and largely to ignore more recent statements on this issue.

The important distinction is between "desegregated" schools and "integrated" schools. There can be no legitimate claim that "racial balance" in the public schools is constitutionally required. *Milliken* v. *Bradley*, 418 U. S. 717, 740–741 (1974) (*Milliken I*). Rather, the Constitution mandates that no school system be structured to segregate the races. The proposition was stated fully in *Swann:*

> "Our objective in dealing with the issues presented by these cases is to see that school authorities exclude no

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[13] Some federal courts continue to read *Swann* v. *Charlotte-Mecklenburg Bd. of Education* as requiring extensive transportation because of its language endorsing the need "to achieve the greatest possible degree of actual desegregation." 402 U. S., at 26. *Swann*, however, simply laid down a broad rule of reason under which desegregation remedies must remain flexible and due consideration must be given to other values and interests. In *Swann*, we recognized that special difficulties arise when extensive busing is used in metropolitan areas "with dense and shifting population[s], numerous schools, [and] congested and complex traffic patterns." *Id.*, at 14. Although *Swann* approved pupil transportation as a remedial device, the Court said that transportation orders would be suspect "when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process." *Id.*, at 30–31. The Court's more recent decisions have dispelled any doubt that may have existed as to whether *Swann* mandates busing to establish racial balance. In this regard, one should note that the Court of Appeals in this case failed to mention *Milliken* v. *Bradley*, 418 U. S. 717 (1974) (*Milliken I*), *Dayton Bd. of Education* v. *Brinkman*, or *Milliken II*, while it relied heavily, and mistakenly, upon *Green*. *Tasby* v. *Estes*, 517 F. 2d 92, 103 (1975).

> pupil of a racial minority from any school, directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, even when those problems contribute to disproportionate racial concentrations in some schools." 402 U. S., at 23.

The question in these cases, as in countless others, is how equitably to remedy unconstitutional state action or inaction. A desegregation decree "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.'" *Milliken II*, 433 U. S., at 280, quoting *Milliken I*, *supra*, at 746. But the courts cannot pursue this goal responsibly without identifying those features of the current situation that can be attributed to the previous dual system.[14]

In this litigation, the District Court ordered the busing of 15,000 students in 1971, 342 F. Supp., at 956, while the current decree is likely to result in the transportation of some 20,000 students. See *supra*, at 442. On the record before us, we cannot determine whether the trial court made findings of constitutional violations that justified these and other reme-

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[14] Last Term, the Court decided school desegregation cases from Columbus and Dayton, Ohio. *Columbus Bd. of Education* v. *Penick*, 443 U. S. 449 (1979); *Dayton Bd. of Education* v. *Brinkman*, 443 U. S. 526 (1979) (*Dayton II*). As the dissent by MR. JUSTICE REHNQUIST argued, the opinions in those cases appeared to depart from prior precedents of this Court. But instead of criticizing either the reasoning or the holdings of any of those cases, the Court simply avoided their force by accepting uncritically the findings made by the courts below. In *Columbus*, it emphasized that the District Court had found "purposefully segregative practices with current, systemwide impact." 443 U. S., at 466, citing 429 F. Supp. 229, 252, 259–260, 264, 266 (SD Ohio 1977). Although the District Court had made no such findings in *Dayton II*, the Court of Appeals for the Sixth Circuit tailored its own factual findings to accord with those in *Columbus*, and these again were adopted by this Court. 443 U. S., at 538–540.

In the instant case, neither the District Court nor the Court of Appeals made comparable findings.

dies that were ordered. For the purpose of deciding the cases in this Court, we may assume that such violations were duly found. In any event, since the 1975 ruling of the District Court this litigation has concentrated solely on the need to eliminate one-race schools through further busing. The petition for certiorari raised only that issue, see Pet. for Cert. in No. 78–253, pp. 2–3, and both the Board, the principal petitioner here, and the Dallas Alliance have asked only that the District Court's order be reinstated. See Brief for Petitioners in No. 78–253, pp. 71–72; Brief for Dallas Alliance as *Amicus Curiae* 28. Consequently, I believe this Court should reach the merits of the remedial question and review the decision of the Court of Appeals that the District Court must explain why "any" one-race schools remain in Dallas. 572 F. 2d, at 1018.

B

Court orders to remedy constitutional deprivations in formerly segregated school systems must be drawn "in light of the circumstances present and the options available," *Green* v. *County School Board*, 391 U. S., at 439, "taking into account the practicalities of the situation." *Davis* v. *School Comm'rs of Mobile County*, 402 U. S., at 37. Although this Court's guidance in desegregation cases necessarily has been general, its emphasis on effectiveness and practicalities reflects an appreciation that perfect solutions may be unattainable in the context of the demographic, geographic, and sociological complexities of modern urban communities. The imperfect nature of court action in school cases is evident in the phenomenon of self-defeating "remedies," desegregation plans and continuing court oversight so unacceptable that many parents seek to avoid the reach of the court's decree. The impact of such remedies may be seen in higher enrollment in private schools, in further migration to the suburbs, or in refusals to move into the school district.

This Court has not considered seriously the relationship between the resegregation problem and desegregation decrees.

The most helpful precedent is *Pasadena City Bd. of Education* v. *Spangler*, which arose several years after a local desegregation plan had been implemented.[15] We held in that case that the Constitution does not require that a desegregation decree be modified periodically as migration patterns shift the distribution of the races within the school district. The Court recognized that, absent further segregation by the State, there is no constitutional obligation to remedy resegregation after an approved plan is implemented. That holding accents the need for courts to consider with care the impact a remedy is likely to have on resegregation. As *Pasadena* establishes, once resegregation occurs without state action courts have no power to impose an additional remedy.

Surprisingly few courts, however, have understood this imperative. One exception is the decision on remand in *Milliken I*, 418 U. S. 717 (1974), where a desegregation plan that left many one-race schools was approved by the Court of Appeals for the Sixth Circuit. The court explained that the available alternatives would have "accelerate[d] the trend toward rendering all or nearly all of Detroit's schools so identifiably black as to represent universal school segregation. . . ." *Bradley* v. *Milliken*, 540 F. 2d 229, 239 (1976), aff'd, *Milliken II*, *supra*.[16] In a case involving a school district in Ala-

[15] In *United States* v. *Scotland Neck Bd. of Education*, 407 U. S. 484, 491 (1972), we disapproved an attempt to create a small new school district within a county conceded to have been operating a dual school system. In a concluding sentence, the Court stated that while the possibility of resegregation "may be cause for deep concern to the respondents, it cannot . . . be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." The Court concluded that the new school district would "interfer[e] with the desegregation of the . . . [c]ounty [s]chool system." *Id.*, at 489. Given the context of the Court's passing reference to resegregation, *Scotland Neck* affords no guidance for the more usual desegregation case.

[16] See *Mapp* v. *Chattanooga Bd. of Education*, 525 F. 2d 169 (CA6 1975), cert. denied, 427 U. S. 911 (1976). The California Supreme Court

bama, however, the Court of Appeals for the Fifth Circuit approved a plan " 'that will probably result in an all-black student body, where nothing in the way of desegregation is accomplished and where neither the white students nor black students are benefited.' " *Lee* v. *Macon County Bd. of Education*, 465 F. 2d 369, 370 (1972). Even though the court acknowledged that the remedy was self-defeating, it ordered the plan implemented unless the local school board could come forward with a plan "equally effective" in eliminating one-race schools. *Ibid.*[17]

The pursuit of racial balance at any cost—the unintended legacy of *Green*—is without constitutional or social justification. Out of zeal to remedy one evil, courts may encourage or set the stage for other evils. By acting against one-race schools, courts may produce one-race school systems. Parents with school-age children are highly motivated to seek access to schools perceived to afford quality education. A desegregation plan without community support, typically one with objectionable transportation requirements and continuing judicial oversight, accelerates the exodus to the suburbs of families able to move. The children of families remaining in the area affected by the court's decree are denied the opportunity to be part of an ethnically diverse student body. See *Parents Assn.*

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has expressly authorized the consideration of resegregation patterns in designing decrees for school litigation under the State Constitution. *Crawford* v. *Los Angeles Bd. of Education*, 17 Cal. 3d 280, 308–309, 551 P. 2d 28, 47 (1976).

[17] The position taken by counsel for one group of respondents in these cases is identical to that of the court in *Lee* v. *Macon County Bd. of Education*. At oral argument, counsel was asked if he still would support the remand ordered by the Court of Appeals if he were certain that additional busing "would result in these black children next year or the year afterwards . . . going to an all-black school because there wouldn't be any whites or any people of any other color to go to school with [in the District]." Counsel replied that his clients' position would be no different in that situation. Tr. of Oral Arg. 49.

of Andrew Jackson High School v. *Ambach*, 598 F. 2d 705, 717 (CA2 1979). The general quality of the schools also tends to decline when substantial elements of the community abandon them.

The effects of resegregation can be even broader, reaching beyond the quality of education in the inner city to the life of the entire community. When the more economically advantaged citizens leave the city, the tax base shrinks and all city services suffer. And students whose parents elect to live beyond the reach of the court decree lose the benefits of attending ethnically diverse schools, an experience that prepares a child for citizenship in our pluralistic society.[18]

III

The District Court in this litigation was properly concerned over resegregation and community support for the Dallas schools.[19] The facts before the court made that concern unavoidable. In the five years following the 1971 desegregation decree, the proportion of Anglo students in the Dallas public schools had dropped by almost half. That destabiliz-

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[18] As I noted in dissent in the *Columbus* case, courts are the branch of government least competent to provide long-range solutions to the resegregation problem. Because the causes of segregation in residential housing are usually beyond judicial correction, wider solutions that will be acceptable to concerned parents must be sought by legislators and executive officials. See 443 U. S., at 480–481 (POWELL, J., dissenting). See also Coleman, *supra* n. 12, at 48–49; Willie, Racial Balance or Quality Education?, in School Desegregation, Shadow and Substance 7 (Levinsohn & Wright eds. 1976).

[19] The District Court appears to have succeeded in enlisting active support from much of the Dallas community for the desegregation plan. The voters have approved an $80 million school bond issue that will assist in implementing the court's decree. In addition, business and civic organizations have "adopted" 144 schools in a community-wide effort to channel volunteers, equipment, and private money to those schools, and to provide part-time and full-time job opportunities for students in those schools. See Brief for Dallas Alliance as *Amicus Curiae* 25.

ing trend has continued in the School District, as reflected by the following figures:

Year	Percentage of Anglo Students
1971	69%
1975	41.1%
1979	33.5% [20]

In view of these far-reaching demographic changes, the futility of administering larger doses of a remedy that has failed is self-evident. In this situation, I can see no justification for reverting now to "time and distance studies" with the goal of attaining increased racial balance through additional busing.

A desegregation remedy that does not take account of the social and educational consequences of extensive student transportation can be neither fair nor effective. The District Court's plan is properly sensitive both to existing demographic realities and to the likely consequences of increased busing. The Court of Appeals seriously erred when it remanded this case with a mandate that seems certain to accelerate the destructive trend toward resegregation.

As this Court should not tolerate this error, even by silence that might give rise to an inference of approval, I dissent from the Court's failure to decide the case and reinstate the District Court's plan—a plan that does have promise for success.

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[20] The Anglo population in the School District is likely to fall off even more since current Anglo enrollment is highest in the high schools and declines steadily through the lower grades.

SECRETARY OF THE NAVY ET AL. *v.* HUFF ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-599. Argued November 6, 1979—Decided January 21, 1980

Held: Navy and Marine Corps regulations which require military personnel on an overseas base to obtain command approval before circulating petitions do not, insofar as they affect the circulation within a base of petitions addressed to Members of Congress, violate 10 U. S. C. § 1034, which provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful or violates a regulation necessary to the security of the United States." Congress enacted § 1034 to ensure that an individual member of the Armed Forces could write to his elected representatives without sending his communication through official channels. Permitting an individual member of the Armed Forces to submit a petition directly to any Member of Congress serves the purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. Thus, the statute does not invalidate regulations such as those involved here. *Brown* v. *Glines, ante,* p. 348.

188 U. S. App. D. C. 26, 575 F. 2d 907, reversed.

Kent L. Jones argued the cause *pro hac vice* for petitioners. On the briefs was *Solicitor General McCree.*

Alan Dranitzke argued the cause for respondents. With him on the brief was *David Addlestone.*

PER CURIAM.

The question in this case is whether Navy and Marine Corps regulations violate 10 U. S. C. § 1034 by requiring military personnel on an overseas base to obtain command approval before circulating petitions addressed to Members of Congress. Section 1034 provides that "[n]o person may restrict any member of an armed force in communicating with a member of Congress, unless the communication is unlawful

or violates a regulation necessary to the security of the United States."

I

In 1974, Frank L. Huff, Robert A. Falatine, and Robert E. Gabrielson were serving in the Marine Corps at the United States Marine Corps Air Station in Iwakuni, Japan. On separate occasions, each of them sought the base commander's permission to circulate a petition addressed to a Member of Congress. The petitions dealt with the use of military forces in labor disputes within the United States, amnesty for men who resisted the draft or deserted the Armed Forces during the Vietnam war, and United States support for the Government of South Korea. The first two requests proposed circulation within the base; the last proposed circulation both within and without the base. The commander denied the first two requests, but he allowed the petition about South Korea to circulate within the base.

On another occasion, Huff and Falatine each asked to distribute a leaflet annotating the Declaration of Independence and the First Amendment with commentary critical of military commanders who restrict petitioning. The base commander denied Falatine's request on the ground that the commentary was disrespectful and contemptuous, but on the same day and without explanation, he granted Huff leave to distribute the same material. Finally, respondents Huff and Falatine were arrested for circulating outside the base a petition to a Member of Congress that objected to American support for the Government of South Korea. They were charged with violating regulations because they had circulated the petition without requesting command approval. Huff was convicted and sentenced to confinement, forfeiture of half-pay, and reduction in grade. The charges against Falatine were dismissed for lack of evidence.

The respondents then brought a class action in the United States District Court for the District of Columbia, seeking

declaratory and injunctive relief against future enforcement of four Navy and Marine Corps regulations.[1] Each regulation provides, in relevant part, that members of the Marine Corps shall not "originate, sign, distribute, or promulgate petitions, publications, . . . or other . . . written material . . . on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained."[2] The

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[1] The class consists of "all members of the Marine Corps stationed at, assigned to, or on duty at the Marine Corps Air Station at Iwakuni, Japan." 413 F. Supp. 863, 864–865 (1976).

The respondents also sought a judgment expunging Falatine's arrest record, invalidating Huff's conviction, and restoring to Huff all benefits denied as the result of his conviction. *Id.*, at 865. Those claims, however, are no longer part of the case. See *infra*, at 456, and n. 4.

[2] Fleet Marine Force Pacific Order 5370.3, ¶ 3 (b) (1974). The full subparagraph reads:

"No Fleet Marine Force, Pacific or Marine Corps Bases, Pacific, personnel will originate, sign, distribute, or promulgate petitions, publications, including pamphlets, newspapers, magazines, handbills, flyers, or other printed or written material, on board any ship, craft, aircraft, or in any vehicle of the Department of the Navy, on any military installation on duty or in uniform, or anywhere within a foreign country irrespective of uniform or duty status, unless prior command approval is obtained."

The other three regulations, although different in geographic scope, use substantially identical language. See Pacific Fleet Instruction 5440.3C, § 2604.2 (2) (1974); First Marine Aircraft Wing Order 5370.1B, ¶ 5 (a) (2) (1974); Iwakuni Marine Corps Air Station Order 5370.3A, ¶ 5 (a) (2) (1973).

Each regulation directs a commander to "control or prohibit" the circulation of written materials that, in his judgment, would:

"(1) Materially interfere with the safety, operation, command, or control of his unit or the assigned duties of particular members of the command; or,

"(2) Present a clear danger to the loyalty, discipline, morale, or safety to [*sic*] personnel of his command; or,

"(3) Involve distribution of material or the rendering of advice or counsel that causes, attempts to cause, or advocates, insubordination, disloyalty,

respondents contended that this requirement violated 10 U. S. C. § 1034 and the First Amendment. The petitioners conceded that the base commander had misapplied the regulations when he denied respondents permission to circulate their petitions within the base, and the respondents sought no relief for these past wrongs. Thus, the issue presented was the facial validity of the regulations that require prior command approval for petitioning inside and outside the Iwakuni air station.

On cross-motions for summary judgment, the court declared the regulations invalid with respect to materials distributed within the base during off-duty hours and away from restricted or work areas. The court upheld the regulations with respect to distributions outside the base. In that situation, the court concluded, command approval was necessary to prevent political activity in violation of the Status of Forces Agreement between the United States and Japan.[3] 413 F. Supp. 863 (1976). The petitioners appealed, but the respondents did not cross appeal.[4]

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mutiny, refusal of duty, solicits desertion, discloses classified information, or contains obscene or pornographic matter; or,

"(4) Involve the planning or perpetration of an unlawful act or acts." Fleet Marine Force Pacific Order 5370.3, ¶ 4 (a) (1974).

See Pacific Fleet Instruction 5440.3C, § 2604.2 (4) (1974); First Marine Aircraft Wing Order 5370.1B, ¶ 6 (c) (1974); Iwakuni Marine Corps Air Station Order 5370.3A, ¶ 5 (c) (1973). The respondents' complaint did not challenge these standards, App. 5–7, and the Court of Appeals did not review them, 188 U. S. App. D. C. 26, 32–33, 575 F. 2d 907, 913–914 (1978). Thus, the only issue before us is the validity of the prior approval requirement.

[3] Article XVI of the Status of Forces Agreement between the United States and Japan specifically proscribes political activity by American servicemen within the host country. [1960] 11 U. S. T. 1664, T. I. A. S. No. 4510.

[4] The respondents had sought expungement of Falatine's arrest record, invalidation of Huff's conviction for petitioning outside the base without permission, and restoration of all benefits denied to Huff as the result of his conviction. Since the District Court found the regulations valid as

The Court of Appeals for the District of Columbia Circuit affirmed in part and vacated in part. 188 U. S. App. D. C. 26, 575 F. 2d 907 (1978). It concluded that the only real controversy between the parties concerned the application of the challenged regulations to petitions addressing Members of Congress. The court therefore considered only the validity of the regulations as they affect circulation within the base of petitions to Congress. It held that requiring prior command approval for the circulation of such petitions violated 10 U. S. C. § 1034. That statute, the court concluded, gives both individuals and groups the right to petition Members of Congress. It allows only such restrictions on that right as are "necessary to the security of the United States." Since the record in this case showed that the Iwakuni base was not within "an actual and current combat zone," the court concluded that petitioners had not shown that a prior restraint on petitioning within the base was necessary to the national security. The court therefore did not reach the question whether the command approval requirement also violated the First Amendment.

We granted certiorari to consider whether the challenged regulations, as they affect the circulation of petitions within a military base, violate 10 U. S. C. § 1034. 440 U. S. 957 (1979).[5]

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applied to petitioning outside the base, the court denied these claims for relief. 413 F. Supp., at 870.

[5] At oral argument, the respondents also contended that regulations requiring members of the Armed Forces to secure command approval before circulating petitions within a military base violate the First Amendment. Tr. of Oral Arg. 30. Our decision today in *Brown* v. *Glines*, *ante*, p. 348, sustains the facial validity of this type of regulation and, therefore, disposes of respondents' First Amendment contention.

We have had no occasion, either in *Glines* or in this case, to consider a claim that regulations were misapplied in a particular instance. See *ante*, at 357, n. 15; *supra*, at 456. We have noted, however, that regulations in each Armed Service were promulgated under a Department of Defense directive that "advises commanders to preserve servicemen's 'right of

II

In *Brown* v. *Glines, ante,* p. 348, decided today, we concluded that "Congress enacted § 1034 to ensure that an individual member of the Armed Services could write to his elected representatives without sending his communication through official channels." *Ante,* at 359. Nothing in the legislative history suggests that Congress intended to authorize the unrestricted circulation of petitions within a military base. Indeed, both Congress and this Court have determined that "the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." *Ante,* at 360. Thus, in construing statutes that affect such matters, we must not limit a commander's authority more than the legislative purpose requires. Permitting an individual member of the Armed Services to submit a petition directly to any Member of Congress serves the purpose of § 1034 without unnecessarily endangering a commander's ability to preserve morale and good order among his troops. In *Glines,* therefore, we held that § 1034 does not invalidate regulations requiring members of the Armed Forces to secure command approval before circulating petitions within a military base.

Since the Court of Appeals reached a contrary conclusion in this case, its judgment is

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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expression . . . to the maximum extent possible, consistent with good order and discipline and the national security.'" *Brown* v. *Glines, ante,* at 355. A member of the service who thinks that his commander has misapplied the regulations can seek remedies within the service. See, *e. g.,* Uniform Code of Military Justice, Art. 138, 10 U. S. C. § 938. Furthermore, the federal courts are open to assure that, in applying the regulations, commanders do not abuse the discretion necessarily vested in them.

[For dissenting opinion of MR. JUSTICE BRENNAN, see *ante*, p. 361.]

MR. JUSTICE STEWART and MR. JUSTICE STEVENS dissent. For the reasons stated in their dissenting opinions in *Brown* v. *Glines*, *ante*, pp. 374 and 378, they would affirm the judgment of the Court of Appeals in this case.

HATZLACHH SUPPLY CO., INC. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

No. 78-1175. Argued December 5, 1979—Decided January 21, 1980

Held: The United States may be held liable in an action under the Tucker Act for breach of an implied contract of bailment when goods are lost while held by the United States Customs Service following their seizure for customs violations.

(a) Title 28 U. S. C. § 2680 (c), which excepts from the Government's tort liability under the Federal Tort Claims Act (FTCA) any claim arising in respect of the detention of merchandise by any customs officer, does not foreclose a remedy on an implied-in-fact contract of bailment. Although the section excludes certain claims from the statutory waiver of immunity from tort liability, it does not limit or otherwise affect immunity waivers contained in other statutes such as the Tucker Act, which invests the Court of Claims with jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States." Neither does § 2680 (c)'s legislative history support the view that it was intended to declare the immunity of the United States from express or implied contracts with customs officers that would, or might, otherwise be within the Court of Claims' jurisdiction under the Tucker Act, but on the contrary it appears that in exempting from the FTCA those claims described in § 2680 (c), Congress did not further intend to disturb other existing statutory remedies.

(b) The fact that individual customs officers are subject to tort liability for negligent loss of goods, does not preclude a contractual remedy against the Government, neither the existence nor lack of a tort remedy being relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable pursuant to its waiver of sovereign immunity under the Tucker Act.

217 Ct. Cl. 423, 579 F. 2d 617, vacated and remanded.

Nathan Lewin argued the cause for petitioner. With him on the briefs were *Jamie S. Gorelick* and *Mark Landesman.*

Kent L. Jones argued the cause *pro hac vice* for the United States. With him on the brief were *Solicitor General Mc-*

Cree, Acting Assistant Attorney General Daniel, Eloise E. Davies, and *Frank A. Rosenfeld.*

PER CURIAM.

We granted certiorari in this case to consider whether the United States may be held liable for breach of an implied contract of bailment when goods are lost while held by the United States Customs Service (USCS) following their seizure for customs violations. 441 U. S. 942 (1979). The Court of Claims granted the Government's motion for summary judgment, finding that petitioner had failed to state a claim upon which the court could grant relief. 217 Ct. Cl. 423, 579 F. 2d 617 (1978). We vacate the Court of Claims' judgment and remand the case for further proceedings.

Petitioner imported camera supplies and other items which USCS seized upon their arrival in port and declared forfeited for customs violations. On petitioner's appropriate procedure for relief, USCS agreed to return the forfeited materials upon petitioner's payment of a $40,000 penalty. When the shipment was returned to petitioner, however, merchandise valued in excess of $165,000 was missing. Petitioner brought suit under the Tucker Act, 28 U. S. C. § 1491, for the value of the missing merchandise,[1] alleging breach of an implied contract of bailment.[2]

The Court of Claims initially conceded that "the statutes cited by the plaintiff, along with the action of the USCS in agreeing to return the seized goods upon payment of a $40,000 fine by Hatzlachh, could make a strong case for the existence of an implied-in-fact contract properly to preserve and redeliver all the goods to Hatzlachh." 217 Ct. Cl., at 428, 579

[1] Petitioner also sought damages, no longer in issue, for loss of "face and good will."

[2] As a second cause of action, petitioner alleged a capricious and arbitrary seizure, "unreasonable detainer" of property, and "deprivation without due process." Petitioner does not challenge the dismissal of this cause of action.

F. 2d, at 620. The court noted, however, that 28 U. S. C. § 2680 (c) excepts from the tort liability of the Government under the Federal Tort Claims Act any claim "arising in respect of . . . the detention of any goods or merchandise by any officer of customs." Because in its view this provision would bar a tort claim for the loss that occurred in this case, the court thought that it "would certainly be a trespass on congressional prerogatives for this court now to hold that, by seizing subject to forfeiture certain merchandise, the Government *assented* to, or agreed to be bound by, an implied-in-fact contract to return the merchandise whole." 217 Ct. Cl., at 430, 579 F. 2d, at 621. The Court of Claims accordingly declined to find an implied-in-fact contract, remarking that it could not "judicially allow by the back door a claim which was, rather clearly and explicitly, legislatively barred at the front." *Ibid.*

We cannot agree with the Court of Claims that § 2680 (c) is such a major obstacle to awarding judgment against the Government on an implied contract. Section 2680, which is entitled "Exceptions," declares that "[t]he provisions of this chapter . . . shall not apply to" certain kinds of claims, which are then described. Among the excepted claims are those specified in § 2680 (c)—claims "arising in respect of . . . the detention of any goods or merchandise" by any customs officer. The section, although excluding certain claims from the statutory waiver of immunity from tort liability,[3] does

[3] We proceed in the text on the assumption, but without deciding, that the Court of Claims was correct in holding that the loss alleged in this case was a claim arising from the detention of goods by a customs officer and hence within the exception carved out by § 2680 (c). Petitioner disputes this holding, claiming that the section is limited to wrongful detentions and does not deal with *losses* and that the courts are divided on the interpretation of the section. *A-Mark, Inc.* v. *United States Secret Service*, 593 F. 2d 849 (CA9 1978), and *Alliance Assurance Co.* v. *United States*, 252 F. 2d 529 (CA2 1958), it is said, permit recovery under the Tort Claims Act for the loss of goods detained by customs officers; whereas this case, *United States* v. *One (1) 1972 Wood, 19 Foot Custom*

not limit or otherwise affect immunity waivers contained in other statutes such as the Tucker Act, which invests the Court of Claims with jurisdiction to render judgment "upon any claim against the United States founded . . . upon any express or implied contract with the United States."

Neither does its legislative history support the view that § 2680 (c), first passed in 1946 as part of the Federal Tort Claims Act, was intended to declare the immunity of the United States from express or implied contracts with customs officers that would, or might, otherwise be within the jurisdiction of the Court of Claims under the Tucker Act. On the contrary, it appears that in exempting from the Tort Claims Act those claims described in § 2680 (c), Congress did not further intend to disturb other existing statutory remedies. H. R. Rep. No. 2245, 77th Cong., 2d Sess., 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess., 7 (1942); H. R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945); S. Rep. No. 1400, 79th Cong., 2d Sess., 33 (1946); Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38 (1940); Tort Claims: Hearings on H. R. 5373 and H. R. 6463 before the House Committee on the Judiciary, 77th Cong., 2d Sess., 28, 44 (1942).[4] Nothing in these sources, nor anything else

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Boat, FL8443AY, 501 F. 2d 1327 (CA5 1974), and *S. Schonfeld Co.* v. *S. S. Akra Tenaron*, 363 F. Supp. 1220 (SC 1973), construe § 2680 (c) to except such losses from the Tort Claims Act.

We need not resolve the conflict. If petitioner is correct in its interpretation, § 2680 (c) would itself present no barrier to either contractual or tort liability. Nor would the existence of a Tort Claims Act remedy in this case be preclusive of pre-existing contractual remedies under the Tucker Act, at least absent some reasonably clear evidence that Congress intended to foreclose contractual remedies in the circumstances obtaining here.

[4] When Congress first considered the exception in 1940, Judge Alexander Holtzoff, then a Special Assistant to the Attorney General, testified before the Senate Judiciary Subcommittee considering the bill. As the then Mr. Holtzoff described the intended effect of the various exemptions, cer-

called to our attention, indicates that the Tort Claims Act withdrew to any extent existing remedies for the breach of express or implied contracts. Others have read the statute and its legislative history to this effect. See 2 L. Jayson, Personal Injury: Handling Federal Tort Claims § 256 (1979); Gellhorn & Schenck, Tort Actions Against the Federal Government, 47 Colum. L. Rev. 722, 729–730 (1947); Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. Law J. 1, 45 (1946); Comment, The Federal Tort Claims Act, 42 Ill. L. Rev. 344, 360 (1947); Note, The Federal Tort Claims Act, 56 Yale L. J. 534, 547–548 (1947).

The Court of Claims relied on *Stencel Aero Engineering Corp.* v. *United States*, 431 U. S. 666 (1977), where it was held that the United States is not liable under the Tort Claims Act to indemnify a third party for damages paid to a member of the Armed Forces who was injured in military training. Recognizing that the Veterans' Benefits Act provided compensation to injured servicemen, which we understood Congress intended to be the sole remedy for service-connected injuries, we declined to construe the Tort Claims Act to permit third-party indemnity suits that in effect would expose the Government to greater liability than that contemplated under the statutory compensation scheme. In *Stencel*, Congress had provided a remedy, which we thought to be exclusive. Here, however, § 2680 (c) denies a tort remedy for cer-

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tain of them, such as the loss or miscarriage of postal matter and certain intentional torts, were included because they related to activities for which, as a policy matter, the Government should be free from tort claims. Other exemptions, such as the assessment or collection of taxes or customs duties, the detention of goods by customs officers, and admiralty or maritime torts, were included because various other laws provided the machinery for recovery on these claims and "[t]here was no purpose in interfering with that machinery." Tort Claims Against the United States: Hearings on S. 2690 before a Subcommittee of the Senate Committee on the Judiciary, 76th Cong., 3d Sess., 38–39 (1940). The purpose was to avoid duplication; there was no indication that existing remedies, if any, were withdrawn.

tain claims; and we fail to see how the *Stencel* holding that the existence of an exclusive statutory compensation remedy negates tort liability supports the conclusion that if the Tort Claims Act bars a tort remedy, neither is there a contractual remedy.

The absence of Government tort liability has not been thought to bar contractual remedies on implied-in-fact contracts, even in those cases also having elements of a tort. In *Keifer & Keifer* v. *RFC*, 306 U. S. 381 (1939), the Government argued that because a Government corporation could not be sued for negligence, neither could it be sued for breach of contract of bailment. The Court rejected the argument, holding that even if there was tort immunity, the waiver of immunity with respect to contract claims was not limited to "suits on contract, express or implied, not sounding in tort." See also *Aleutco Corp.* v. *United States*, 244 F. 2d 674, 679 (CA3 1957); *New England Helicopter Service, Inc.* v. *United States*, 132 F. Supp. 938, 939 (RI 1955).[5]

The United States does not now defend the reasoning of the Court of Claims that § 2680 (c) forecloses a remedy on an implied-in-fact contract of bailment. Tr. of Oral Arg. 37–38. It does support the judgment on a ground concededly not urged in the Court of Claims: that the contractual remedy should be rejected because individual customs officers are subject to tort liability and because 28 U. S. C. § 2006 provides that judgments against customs officers for negligent

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[5] The Tucker Act itself is only a jurisdictional statute, of course, and does not create a substantive right to money damages. *United States* v. *Testan*, 424 U. S. 392, 398 (1976). The enforceable claim in this case must arise from the alleged contract. Moreover, the Court of Claims' jurisdiction with respect to contracts extends only to actual contracts, either express or implied in fact; it does not reach claims on contracts implied in law. *Alabama* v. *United States*, 282 U. S. 502, 507 (1931); *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287, 292–293 (1928); *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217 (1926); *Hill* v. *United States*, 149 U. S. 593, 598 (1893).

loss of goods, where seizure was made with probable cause, shall be paid by the United States. The existence of this private recourse, it is urged, counsels against recognizing a contractual remedy under the Tucker Act. We find the argument unpersuasive. There is no inconsistency between a contractual remedy against the Government and a tort remedy against customs officers. Cf. *Keifer & Keifer, supra.* Without more, neither the existence of a tort remedy nor the lack of one is relevant to determining whether there is an implied-in-fact contract of bailment upon which the United States is liable in the Court of Claims pursuant to its waiver of sovereign immunity contained in the Tucker Act.

Because the Court of Claims' judgment rested heavily on a mistaken view of the legal significance of § 2680 (c) and because the Court of Claims should first address the question of an implied-in-fact contract without regard to that section, we vacate the judgment of the Court of Claims and remand the case to that court for further proceedings consistent with this opinion.[6]

So ordered.

MR. JUSTICE BLACKMUN, dissenting.

I do not disagree with the legal principles pronounced by the Court in its *per curiam* opinion to the effect that 28 U. S. C. § 2680 (c) is not an obstacle to the awarding of judgment against the Government on an implied contract, *ante,* at 462; or that, in exempting from the Tort Claims Act those claims described in § 2680 (c), Congress did not also intend to disturb other existing statutory remedies, *ante,* at 463; or that *Stencel Aero Engineering Corp.* v. *United States,* 431 U. S. 666 (1977), does not control this case, *ante,* at 464–465; or that the absence of governmental tort liability does

[6] We indicate no view, one way or the other, as to whether an implied-in-fact contract could be found on the record in this case.

not bar contractual remedies on implied-in-fact contracts, *ante*, at 465; or that there is no inconsistency between a contractual remedy against the Government and a tort remedy against customs officers, *ante*, at 466. But I dissent from the Court's vacating the judgment of the Court of Claims and its remanding the case to that court for further proceedings.

I dissent because I am persuaded that an implied-in-fact contract is not to be found on the record in this case, and because I believe the remand is, or should be, a useless exercise leading to an inevitable result.

It is clear that jurisdiction of the Court of Claims extends to contracts implied in fact but not to those implied in law, See *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217–218 (1926); *Merritt* v. *United States*, 267 U. S. 338, 341 (1925). Here, the Customs Service seized the goods and declared them forfeited for customs violations. There is no question as to the legality of that seizure. See *One Lot Emerald Cut Stones* v. *United States*, 409 U. S. 232, 234 (1972). Indeed, petitioner has admitted that the customs declaration was improper. 217 Ct. Cl. 423, 425, 579 F. 2d 617, 618 (1978); App. 11a, 18a. The Government's action, thus, was a claim of forfeiture and an assertion of ownership. There was no uninterrupted title in petitioner, recognized by the parties, as would constitute the basis of a contract implied in fact to return the goods. See *Baltimore & Ohio R. Co.* v. *United States*, 261 U. S. 592, 597 (1923). If the forfeiture is not upheld, the duty to return the goods is one implied, not in fact, but in law, and is so implied from the duty imposed upon the Customs Service by statute. See 28 U. S. C. § 2465. Any recovery for failure on the part of the Service to fulfill that duty would be founded in tort, or perhaps in equity, but not in contract.

It therefore seems to me inevitably to follow that there is no jurisdiction over this case in the Court of Claims. See *Baltimore & Ohio R. Co.* v. *United States, supra; Russell*

Corp. v. *United States*, 210 Ct. Cl. 596, 609, 537 F. 2d 474, 482 (1976), cert. denied, 429 U. S. 1073 (1977). Any remedy for petitioner lies elsewhere. Accordingly, I would affirm the judgment of the Court of Claims, albeit on a different ground from the one advanced by that court.

TAGUE v. LOUISIANA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

No. 79-5386. Decided January 21, 1980

Held: Petitioner's inculpatory statement to the arresting officer was erroneously admitted in evidence at his state-court trial at which he was convicted, where no evidence was introduced to prove that petitioner knowingly and intelligently waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, before making the statement.

Certiorari granted; 372 So. 2d 555, reversed and remanded.

PER CURIAM.

Petitioner was charged with armed robbery in violation of La. Rev. Stat. Ann. § 14:64 (West 1974). He was convicted by a jury and sentenced to 65 years at hard labor without benefit of parole. His conviction was affirmed by the Supreme Court of Louisiana in a brief *per curiam* opinion. 372 So. 2d 555, 556 (1979). On rehearing, a divided court reaffirmed petitioner's conviction. *Ibid.* It rejected his contention that an inculpatory statement made to the arresting officer and introduced at trial had been obtained in violation of his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966).

At the suppression hearing in the trial court, the arresting officer testified that he read petitioner his *Miranda* rights from a card, that he could not presently remember what those rights were, that he could not recall whether he asked petitioner whether he understood the rights as read to him, and that he "couldn't say yes or no" whether he rendered any tests to determine whether petitioner was literate or otherwise capable of understanding his rights. 372 So. 2d, at 557.

A majority of the Supreme Court of Louisiana held that an arresting officer is not

"compelled to give an intelligence test to a person who

has been advised of his rights to determine if he understands them. . . .

"Absent a clear and readily apparent lack thereof, it can be presumed that a person has capacity to understand, and the burden is on the one claiming a lack of capacity to show that lack. LSA—C. C. arts. 25 and 1782. . . ." *Id.*, at 557–558.

Justice Dennis in dissent wrote that

"[c]ontrary to the explicit requirements of the United States Supreme Court in *Miranda* v. *Arizona*, 384 U. S. 436, . . . the majority today creates a presumption that the defendant understood his constitutional rights and places the burden of proof upon the defendant, instead of the state, to demonstrate whether the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Id.*, at 558.

We agree. The majority's error is readily apparent. *Miranda* v. *Arizona* clearly stated the principles that govern once the required warnings have been given.

"If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. *Escobedo* v. *Illinois*, 378 U. S. 478, 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, *Johnson* v. *Zerbst*, 304 U. S. 458 (1938), and we re-assert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interroga-

> tion, the burden is rightly on its shoulders." 384 U. S., at 475.

Just last Term, in holding that a waiver of *Miranda* rights need not be explicit but may be inferred from the actions and words of a person interrogated, we firmly reiterated that

> "[t]he courts must presume that a defendant did not waive his rights; the prosecution's burden is great. . . ." *North Carolina* v. *Butler,* 441 U. S. 369, 373 (1979).

In this case no evidence at all was introduced to prove that petitioner knowingly and intelligently waived his rights before making the inculpatory statement. The statement was therefore inadmissible.

Accordingly, the motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted, the judgment is reversed, and the case is remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with this opinion.

So ordered.

THE CHIEF JUSTICE would set the case for oral argument.

MR. JUSTICE REHNQUIST dissents. He thinks that, under the circumstances described in the opinion of the Supreme Court of Louisiana, the judgment of that court was fully consistent with *North Carolina* v. *Butler,* 441 U. S. 369 (1979), and not inconsistent with any other decision of this Court.

BOEING CO. *v.* VAN GEMERT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-1327. Argued December 3, 1979—Decided February 19, 1980

Petitioner company called for the redemption of certain convertible debentures, fixing a date by which debenture holders could convert their debentures into shares of petitioner's stock and after which debenture holders could only redeem their debentures for slightly more than face value. After the deadline expired, some of the nonconverting debenture holders brought a class action against petitioner, claiming that it had violated federal and state laws by failing to give reasonably adequate notice of the redemption. The District Court ultimately entered judgment against petitioner, establishing the amount of its liability to the class as a whole, and fixing the amount that each class member could recover on a principal amount of $100 in debentures, with each individual recovery to carry its proportionate share of the total amount allowed for attorney's fees, expenses, and disbursements. Petitioner appealed only the judgment's provision as to attorney's fees, contending that such fees should be awarded only from the portion of the fund actually claimed by class members, not from the unclaimed portion of the judgment fund. The Court of Appeals affirmed, holding that since each class member had a present vested interest in the class recovery and could collect his share of the judgment upon request, absentee class members had received a benefit within the meaning of the common-fund doctrine, which allows the assessment of attorney's fees against a common fund created by the lawyers' efforts.

Held:

1. The attorney's fee award in this case is a proper application of the common-fund doctrine, which rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigants' expense. The criteria for application of the doctrine are satisfied when, as here, each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. In this case, absentee class members need prove only their membership in the injured class to claim their logically ascertainable shares of the judgment fund. Their right to share the harvest of the suit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel, and

unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. This inequity is rectified by the District Court's judgment requiring every class member to share attorney's fees to the same extent that he can share the recovery. Pp. 478–481.

2. The common-fund doctrine, as applied in this case, is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees. The class members, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery, whereas petitioner's present interest is limited to its stake in resisting third-party claims against the fund in view of petitioner's colorable claim for the return of any unclaimed money. Although petitioner itself cannot be obliged to pay fees awarded to the class lawyers, its latent claim against unclaimed money may not defeat each class member's equitable obligation to share the expenses of litigation. Pp. 481–482.

590 F. 2d 433, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 482.

S. Hazard Gillespie argued the cause for petitioner. With him on the briefs were *Sheila T. McMeen* and *Bruce A. Baird.*

Norman Winer argued the cause for respondents and filed a brief for certain respondents. *Stuart D. Wechsler, Samuel K. Rosen,* and *Samuel Weinstein* filed a brief for other respondents.*

MR. JUSTICE POWELL delivered the opinion of the Court.

The question presented in this class action is whether a proportionate share of the fees awarded to lawyers who represented the successful class may be assessed against the unclaimed portion of the fund created by a judgment.

**George J. Solleder, Jr.*, Special Master, *pro se*, filed a brief as *amicus curiae.*

I

In March 1966, The Boeing Co. called for the redemption of certain convertible debentures. Boeing announced the call through newspaper notices and mailings to investors who had registered their debentures. The notices, given in accordance with the indenture agreement, recited that each $100 amount of principal could be redeemed for $103.25 or converted into two shares of the company's common stock. They set March 29 as the deadline for the exercise of conversion rights. Two shares of the company's common stock on that date were worth $316.25. When the deadline expired, the holders of debentures with a face value of $1,544,300 had not answered the call. These investors were left with the right to redeem their debentures for slightly more than face value.

Van Gemert and several other nonconverting debenture holders brought a class action against Boeing in the United States District Court for the Southern District of New York. They claimed that Boeing had violated federal securities statutes as well as the law of New York by failing to give them reasonably adequate notice of the redemption. As damages, they sought the difference between the amount for which their debentures could be redeemed and the value of the shares into which the debentures could have been converted. The District Court dismissed the action on the ground that Boeing had given its debenture holders the notice required by the indenture agreement. The Court of Appeals for the Second Circuit reversed and remanded. It held that, under the New York law of contracts, the indenture agreement contained an implied obligation to give debenture holders reasonable notice of a redemption. The court concluded that the notice actually given was inadequate. 520 F. 2d 1373, cert. denied, 423 U. S. 947 (1975).

On remand, the District Court awarded as damages the difference between the redemption price of the outstanding debentures and the price at which two shares of Boeing's

common stock traded on the last day for exercising conversion rights. The court, however, refused to assess prejudgment interest against Boeing. There followed a second appeal. The class claimed that the stock should have been valued as of a later date and that Boeing was liable for prejudgment interest. Class members who had filed individual claims also contended that they were entitled to receive pro rata shares of any unclaimed damages. At the least, they argued, they should receive enough of the unclaimed money to pay their legal expenses.

The Court of Appeals found the class entitled to prejudgment interest on the award, but it approved the valuation date. The court also concluded that class members who proved their individual claims should not share in the unclaimed portion of the judgment. Allowing these class members to receive a proportionate part of the unclaimed money, the court held, would create the sort of "fluid class" recovery rejected in *Eisen* v. *Carlisle & Jacquelin*, 479 F. 2d 1005 (CA2 1973), vacated and remanded on other grounds, 417 U. S. 156 (1974). Such a recovery would expropriate funds belonging to class members who had not asserted their claims and give a windfall to those who had claimed. Finally, the court decided that claiming class members could not use the unclaimed portion of the judgment to defray their legal expenses. Since Boeing could have a right to money that never was claimed, the court thought that awarding attorney's fees from the remaining funds might shift fees to the losing party in violation of the American rule reaffirmed in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240 (1975). 553 F. 2d 812 (1977).

On the second remand, the District Court entered the judgment now at issue. The court first established the amount of Boeing's liability to the class as a whole. It provided that respondents, "in behalf of all members of the plaintiff class, . . . shall recover as their damages . . . the principal sum

of $3,289,359 together with [prejudgment] interest. . . ." App. 40a.[1] The court then fixed the amount that each member of the class could recover on a principal amount of $100 in debentures. Each individual recovery was to carry its proportionate share of the total amount allowed for attorney's fees, expenses, and disbursements.[2] That share, the court declared, "shall bear the same ratio to all such fees, expenses and disbursements as such class member's recovery shall bear to the total recovery" awarded the class. *Id.*, at 40a–41a. Finally, the court ordered Boeing to deposit the amount of the judgment into escrow at a commercial bank,[3] and it appointed a Special Master to administer the judgment and pass on the validity of individual claims.[4] The court retained jurisdiction pending implementation of its judgment.

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[1] The relevant paragraph of the District Court's judgment declares in full:

"ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N. Y. C. P. L. R. § 5001 (a) from March 9, 1966 to the date of this judgment, with costs to be taxed. . . ." App. 40a.

[2] The class lawyers have requested fees totaling about $2 million. 573 F. 2d 733, 735, n. 3 (1978) (panel opinion).

[3] Interest on the principal sum of $3,289,359 from the conversion deadline to the date of judgment amounted to $2,459,647, bringing the judgment to $5,749,006. With income earned on investments and other additions, the fund now totals over $7 million. Brief for Special Master as *Amicus Curiae* 4–6.

[4] The District Court gave the Special Master a broad mandate to "direct the parties in the necessary ministerial steps to effectuate the Judgment, receive all proofs of claim to participate in the Fund established by the Judgment, pass on the validity of same, direct the giving of notices to interested persons of hearings on disputed claims, conduct the

Boeing appealed only one provision of the judgment. It claimed that attorney's fees could not be awarded from the unclaimed portion of the judgment fund for at least two reasons. First, the equitable doctrine that allows the assessment of attorney's fees against a common fund created by the lawyers' efforts was inapposite because the money in the judgment fund would not benefit those class members who failed to claim it. Second, because Boeing had a colorable claim for the return of the unclaimed money, awarding attorney's fees from those funds might violate the American rule against shifting fees to the losing party. Therefore, Boeing contended, the District Court should award attorney's fees from only the portion of the fund actually claimed by class members. A panel of the Court of Appeals agreed with Boeing, 573 F. 2d 733 (1978), but the court en banc affirmed the District Court's judgment, 590 F. 2d 433 (1978).

The Court of Appeals en banc found that each class member had a "present vested interest in the class recovery" and that each could collect his share of the judgment upon request.

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necessary hearings, submit reports thereon and in general supervise the administration of the Judgment and decide all disputed questions of law and fact connected therewith subject to confirmation by the Court. . . ." App. 42a.

In the year following his appointment, the Special Master mailed notices to debenture holders who could be identified and published notices in two national newspapers. By July 15, 1978, the Special Master had received claims accounting for $290,000 worth of the $1,544,300 in unconverted debentures. Brief for Special Master as *Amicus Curiae* 11. The District Court then extended the time for filing proofs of claims, and the Master renewed his efforts to locate holders of the remaining debentures. Further research in files kept by the trustee under the indenture agreement revealed the identity of additional debenture holders. A professional search firm endeavored to trace holders who had relocated. Banks and brokerage houses also were furnished with information that might help them to locate clients who had invested in the debentures. As of July 18, 1979, shortly before he filed his brief with this Court, the Master had received claims accounting for $706,600 worth of debentures or about 47% of the unconverted securities. *Id.*, at 14.

Thus, the court held, absentee class members had received a benefit within the meaning of the common-fund doctrine. *Id.*, at 439. The court also found its holding consistent with the American rule. It noted that lawyers for the class would receive their fees "from the amount for which Boeing has *already* been held liable. There is no 'surcharge' on the defeated litigant." *Id.*, at 441–442. We granted certiorari, 441 U. S. 942 (1979), and we now affirm.

II

Since the decisions in *Trustees* v. *Greenough*, 105 U. S. 527 (1882), and *Central Railroad & Banking Co.* v. *Pettus*, 113 U. S. 116 (1885), this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole. See *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939); cf. *Hall* v. *Cole*, 412 U. S. 1 (1973). The common-fund doctrine reflects the traditional practice in courts of equity, *Trustees* v. *Greenough*, *supra*, at 532–537, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S., at 257–258. The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. See, *e. g.*, *Mills* v. *Electric Auto-Lite Co.*, 396 U. S., at 392. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit. See *id.*, at 394.

In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, we noted the features that distinguished our common-fund cases from cases where the shifting of fees was inappropriate. First, the classes of persons benefited by the lawsuits "were

small in number and easily identifiable." 421 U. S., at 265, n. 39. Second, "[t]he benefits could be traced with some accuracy. . . ." *Ibid.* Finally, "there was reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefiting." *Ibid.* Those characteristics are not present where litigants simply vindicate a general social grievance. *Id.*, at 263–267, and n. 39. On the other hand, the criteria are satisfied when each member of a certified class has an undisputed and mathematically ascertainable claim to part of a lump-sum judgment recovered on his behalf. Once the class representatives have established the defendant's liability and the total amount of damages, members of the class can obtain their share of the recovery simply by proving their individual claims against the judgment fund. This benefit devolves with certainty upon the identifiable persons whom the court has certified as members of the class. Although the full value of the benefit to each absentee member cannot be determined until he presents his claim, a fee awarded against the entire judgment fund will shift the costs of litigation to each absentee in the exact proportion that the value of his claim bears to the total recovery. See generally Dawson, Lawyers and Involuntary Clients in Public Interest Litigation, 88 Harv. L. Rev. 849, 916–922 (1975).

In this case, the named respondents have recovered a determinate fund for the benefit of every member of the class whom they represent. Boeing did not appeal the judgment awarding the class a sum certain.[5] Nor does Boeing contend

[5] Boeing contends that the judgment in this case was simply a procedural device ordering Boeing to pay into escrow its maximum potential liability to the class. The judgment will not be final, Boeing argues, until absentee class members have presented their individual claims. Thus, Boeing concludes, the judgment fund confers no benefit on class members who fail to claim against it. Brief for Petitioner 25–26, and n. *.

We think that Boeing misreads the judgment. The District Court explicitly ordered that "plaintiffs in behalf of all members of the plaintiff

that any class member was uninjured by the company's failure adequately to inform him of his conversion rights. Thus, the damage to each class member is simply the difference between the redemption price of his debentures and the value of the common stock into which they could have been converted. To claim their logically ascertainable shares of the judgment fund, absentee class members need prove only their membership in the injured class. Their right to share the harvest of the lawsuit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of the class representatives and their counsel. Unless absentees contribute to the payment of attorney's fees incurred on their behalves, they will pay nothing for the creation of the fund and their representatives may bear additional costs. The judgment entered by the District Court and affirmed by the Court of Appeals rectifies this inequity by requiring every member of the class to share attorney's fees to the same extent that he can share the recovery.[6] Since the benefits of the class

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class . . . shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest. . . ." See n. 1, *supra*. Nothing in the court's order made Boeing's liability for this amount contingent upon the presentation of individual claims. Thus, we need not decide whether a class-action judgment that simply requires the defendant to give security against all potential claims would support a recovery of attorney's fees under the common-fund doctrine.

We also think that Boeing's arguments come too late. Although the District Court did not fix the amount of attorney's fees to be assessed against absentee class members, its judgment terminated the litigation between Boeing and the class concerning the extent of Boeing's liability. See *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555, 559–561 (CA7 1975). This is not a case, like *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976), where a prayer for attorney's fees against an opposing party remains unanswered. See *Richerson* v. *Jones*, 551 F. 2d 918, 921–922 (CA3 1977). Thus, the judgment awarding the class a fixed recovery was final and appealable. Since Boeing did not appeal it, we cannot now consider whether the judgment was in error.

[6] Since an award of attorney's fees under the common-fund doctrine simply relieves claiming class members of costs incurred for the benefit

recovery have been "traced with some accuracy" and the costs of recovery have been "shifted with some exactitude to those benefiting," *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* at 265, n. 39, we conclude that the attorney's fee award in this case is a proper application of the common-fund doctrine.

III

The common-fund doctrine, as applied in this case, is entirely consistent with the American rule against taxing the losing party with the victor's attorney's fees. See *Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* at 247. The District Court's judgment assesses attorney's fees against a fund awarded to the prevailing class. Since there was no appeal from the judgment that quantified Boeing's liability, Boeing presently has no interest in any part of the fund.[7] The members of the class, whether or not they assert their

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of others, we see no merit in Boeing's contention that the award amounts to a "fluid class" recovery. See Tr. of Oral Arg. 20. Here, as in *Eisen* v. *Carlisle & Jacquelin,* 417 U. S. 156, 172, n. 10 (1974), we express no opinion on the validity of judgments permitting such recoveries.

[7] Although we recognize that this 14-year-old case has had a fractured career in the courts, we do not agree with MR. JUSTICE REHNQUIST's dissenting view that the judgment before us lacks finality. *Post,* at 482. The District Court's judgment first ordered Boeing to pay a specified sum to the entire class and then assessed undetermined attorney's fees against the entire fund created by the judgment. The judgment on the merits stripped Boeing of any present interest in the fund. Thus, Boeing had no cognizable interest in further litigation between the class and its lawyers over the amount of the fees ultimately awarded from money belonging to the class. But Boeing did have an interest, arising from its colorable claim for the return of excess money, in whether attorney's fees could be assessed against the entire fund rather than against the portion actually claimed. Since the District Court's order assessed attorney's fees against the entire fund, it was a final judgment on the only issue in which Boeing still had an interest. In the peculiar circumstances of this case, Boeing could secure review of the allocation of fees only by appealing from this adverse judgment.

rights, are at least the equitable owners of their respective shares in the recovery. Any right that Boeing may establish to the return of money eventually unclaimed is contingent on the failure of absentee class members to exercise their present rights of possession.[8] Although Boeing itself cannot be obliged to pay fees awarded to the class lawyers, its latent claim against unclaimed money in the judgment fund may not defeat each class member's equitable obligation to share the expenses of litigation.

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE REHNQUIST, dissenting.

In disposing of this case on the merits, the Court gives short shrift to the question of appealability, a threshold issue by no means free from doubt even under the most generous view of our decided cases. I have concluded from these cases, viewed in light of the longstanding policy of the federal judicial system against piecemeal appeals, that the judgment now before us lacks the finality required by 28 U. S. C. § 1291, and I would therefore remand this case to the Court of Appeals with instructions to dismiss Boeing's appeal. Exhibit "A" of the shortsightedness of the Court's sloughing off the issue of appealability as it does is the fact that the parties are obliged to refer to the present case not merely as *"Van Gemert,"* but as *"Van Gemert III."* This case, which began in March 1966, has been appealed to the Court of Appeals for the Second Circuit three times, and now, after 14 years of litigation, this Court affirms the third decision of the Court of Appeals.

There is no doubt as to the appealability of the first of the three decisions of the District Court, since it dismissed

[8] The Court of Appeals did not consider the ultimate disposition of whatever money may remain in the fund after the District Court enforces a deadline for the presentation of individual claims. 590 F. 2d 433, 440, n. 17 (1978). We likewise express no opinion on that question.

respondents' complaint with prejudice. The second appeal was also by respondents from a determination by the District Court that respondents were not entitled to any prejudgment interest; this decision was also reversed by the Court of Appeals. Following this second remand, the District Court entered a "Judgment and Order" stating that Boeing was liable to respondent class in the amount of $3,289,359 plus interest, ordering Boeing to pay this amount into escrow, and indicating that respondents' attorneys could recover their fees "out of said total amount of this judgment." At this point, Boeing appealed for the first time, asserting that respondents' attorneys should collect their fees only out of that portion of the fund actually claimed. As noted by the Court, the Court of Appeals en banc affirmed this aspect of the District Court's order.

The novelty of the question posed by Boeing is attributable in large part to the historic prevalence of the "American rule," which generally prevents a court from requiring the losing party to pay the prevailing party's attorney's fees. In recent years, however, the proliferation of class actions and the enactment of various statutes modifying the American rule [1] have multiplied the opportunities for recovering attorney's fees and have simultaneously spawned a great deal of litigation over assessment of those fees. These developments lend added significance to the procedural implications of our decisions in this area.

In the typical American-rule case, the federal judicial system, by statute and rule, has generally made a final order a prerequisite to appellate review. A judgment is not considered final, and therefore appealable, until the district court has completed all but the most ministerial acts. Arguably,

[1] See, *e. g.*, 5 U. S. C. § 552 (a)(4)(E) (permitting award of attorney's fees in actions brought under Freedom of Information Act); 15 U. S. C. § 1691e (d) (suits under Equal Credit Opportunity Act); 42 U. S. C. § 2000e–5 (k) (Title VII suits under Civil Rights Act of 1964); 42 U. S. C. § 1988 (civil-rights suits).

litigation necessitating an award of attorney's fees should be treated no differently. It would be quite reasonable, I believe, to postpone appeal in such cases until the District Court had entered judgment not only on liability and damages, but also on whether and in what amount attorney's fees will be assessed. Cf. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737 (1976) (dismissing appeal from judgment of liability in Title VII action under Civil Rights Act of 1964 where requests for injunction, damages, and attorney's fees remained pending in the District Court).

For better or for worse, the little precedent that exists in this area has tended to deviate from such a sensible approach. This deviation has been particularly noticeable when the right to attorney's fees has been based on the existence of a "common fund" such as that discussed in the opinion of the Court. Beginning with *Trustees* v. *Greenough*, 105 U. S. 527 (1882), the Court has evidenced a willingness to treat the division of the common fund as a separate piece of litigation for purposes of appeal. In *Greenough*, for example, this Court entertained an appeal from an order allowing a successful plaintiff bondholder to recover attorney's fees even though the original action remained pending in the trial court for purposes of administration. The Court stated that the award of fees, "though incidental to the [original] cause," was sufficiently "collateral," "distinct," and "independent," to be appealable in its own right. *Id.*, at 531.

From *Greenough* it was an analytically short, though temporally long, step to the decision of the Court of Appeals for the Seventh Circuit in *Swanson* v. *American Consumer Industries, Inc.*, 517 F. 2d 555 (1975). In that shareholders' derivative suit, the District Court entered judgment in favor of plaintiffs and awarded damages. Seven months later it granted attorney's fees to prevailing counsel under an "extension" of *Greenough*. 517 F. 2d, at 560. Two notices of appeal were filed from this latter order, one on behalf of

plaintiffs challenging the amount of damages and the other on behalf of plaintiffs and their attorneys challenging the amount of attorney's fees. The Court of Appeals dismissed the appeal on the question of damages as untimely, reasoning that the District Court's determination of damages was final, and therefore appealable, upon entry of the first order.

Greenough and *Swanson* represent two sides of the same coin. If an attorney's attempt to secure fees from the common fund is "collateral" enough to support an independent appeal despite the continued pendency of the main litigation,[2] then the judgment establishing the fact and amount of the defendant's liability in the main litigation should also support a separate appeal despite the continued pendency of a dispute over division of the fund between the beneficiaries and their attorneys.[3]

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[2] See also *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 169 (1939) (claim for fees out of common fund "sufficiently different" from parent claim to support separate appeal); *Preston* v. *United States*, 284 F. 2d 514 (CA9 1960) (attorney's appeal from District Court's refusal to award fees on common-fund theory); *Angoff* v. *Goldfine*, 270 F. 2d 185 (CA1 1959) (attorney's appeal from District Court's refusal to grant him fees out of settlement fund).

[3] Outside the common-fund context, the consensus in the lower courts over the permissibility of bifurcated appeals dissolves. Two Courts of Appeals, including the Seventh Circuit, appear to have carried the *Greenough/Swanson* approach over into cases where one party recovers attorney's fees directly from an opposing party. In *Hidell* v. *International Diversified Investments*, 520 F. 2d 529 (CA7 1975), for example, appellee had brought suit under the securities laws. The District Court entered a judgment granting appellee an injunction, damages, and "reasonable" attorney's fees. The Court of Appeals, citing *Swanson*, allowed the defendant to appeal the merits of the dispute prior to the actual determination of those fees.

In *Lowe* v. *Pate Stevedoring Co.*, 595 F. 2d 256, 257 (CA5 1979), the plaintiff had prevailed on the merits of an unfair-representation suit against his union. The District Court granted plaintiff's attorney fees as the result of the union's "bad faith," but denied plaintiff's attorney a lien against the union to secure his fee. The Court of Appeals, relying on

Implicit in this bifurcated approach to appealability in common-fund cases is a strict bifurcation of the issues that can be litigated in either appeal. Thus, this Court would not have permitted the trustees in *Greenough* to contest in their appeal the merits of the dispute that generated the common fund. Nor, I venture, would the Court of Appeals for the Seventh Circuit have allowed a timely appeal on the issue

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Swanson, Preston v. *United States, supra,* and *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), allowed the attorney to prosecute his appeal even though his client's prayer for reinstatement remained pending in the District Court. To the extent that the Fifth Circuit treats such an appeal as severable from the main cause of action, it might also treat an appeal from the main litigation as severable from the attorney's-fees proceeding.

Two other Courts of Appeals have rejected the bifurcated model of appealability in non-common-fund cases. In *Richerson* v. *Jones,* 551 F. 2d 918, 922 (1977), the Third Circuit confronted an appeal by the United States from a judgment of liability in a discrimination suit. The District Court's order had awarded plaintiff promotion, backpay, and interest, but had not yet ruled on plaintiff's request for attorney's fees. In holding that the United States had not appealed from a final order, the Court of Appeals relied upon *Liberty Mutual Ins. Co.* v. *Wetzel,* 424 U. S. 737 (1976), and distinguished *Swanson* as a case where plaintiff was not seeking to collect fees from his adversary.

Employing similar analysis, the Second Circuit twice has held that, where the obligation to pay an opposing party's attorney's fees arises out of an agreement that is also the subject of the original litigation, the attorney's-fees issue is not sufficiently collateral to allow appeal from a judgment on the merits prior to a determination of the attorney's fees. See *Aetna Casualty & Surety Co.* v. *Giesow,* 412 F. 2d 468 (1969) (suit for breach of subordination agreement); *Union Tank Car Co. v. Isbrandtsen,* 416 F. 2d 96 (1969) (suit to enforce settlement agreement). Judge Friendly has attempted to reconcile *Giesow* with the common-fund cases. See *Cinerama, Inc.* v. *Sweet Music, S. A.,* 482 F. 2d 66, 70, n. 2 (CA2 1973). See also *Union Tank Car Co.* v. *Isbrandtsen, supra,* at 97.

This overview is offered only to illustrate the complexity of this issue. Perhaps all these cases can be reconciled in some principled manner; if not, it is only a matter of time before this Court will have to try its hand at an issue that obviously has been perplexing other federal courts. In the meantime, I believe that we should tread quite carefully in this area.

of damages to challenge the amount of attorney's fees assessed, an issue that was the subject of a later, separate appeal. In each case, appellant would be powerless to reach backward or forward from the "collateral" proceeding to the "merits" of the lawsuit.

But this is exactly what the Court permits Boeing to do in this case. Assuming, as seems likely, that the *Greenough/Swanson* model of bifurcated appealability will prevail, I have no doubt that Boeing could have appealed, at this stage of the proceedings, from the judgment that it was liable to the plaintiff class in the amount of $3,289,359 plus interest. But as the Court concedes, indeed stresses, Boeing has not challenged either the fact of liability or the amount. See *ante*, at 479–480, n. 5. Such an appeal must have appeared futile in light of *Van Gemert I*, 520 F. 2d 1373 (1975), which established liability, and *Van Gemert II*, 553 F. 2d 812 (1977), which established the precise amount of damages payable to each member of the class. Instead, Boeing relies on the "finality" of the District Court's judgment on the merits, the *Swanson* side of the coin, to prosecute an appeal on the division of the common fund, the *Greenough* side of the coin. As noted above, such crisscrossing of contentions is inconsistent with a bifurcated approach to appellate litigation in common-fund cases.

Even if Boeing is to be allowed to appeal under the "collateral order" rubric in this case, the order from which it appealed was not final even under that doctrine. *Greenough* itself noted that the trustees brought their appeal from "a *final* determination of the particular matter arising upon the complainant's petition for allowances. . . ." 105 U. S., at 531 (emphasis added). Similarly, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949), which formalized the "collateral order" doctrine presaged in *Greenough*, requires that the order appealed from be the "*final* disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." 337 U. S., at 546–547 (em-

phasis added). In this case, however, that portion of the litigation involving the attorney's fees is still in its most nascent phase. We do not know, for example, when these fees are going to be assessed, how they will be calculated, or what will become of that portion of the fund that is neither claimed nor paid out in fees.

Nowhere does this lack of finality manifest itself more than in the Court's holding that Boeing has standing to litigate over the division of the spoils even though it may not have any continuing interest whatsoever in the money held in escrow.[4] In allowing Boeing to base its appeal on a "colorable claim for the return of [any] excess," *ante*, at 481, n. 7, the Court comes dangerously close to assuming in a single phrase that Boeing has standing. At best this analysis is unnecessary, since final settlement of the conflicting claims to the fund would establish Boeing's standing once and for all. At worst it represents a dangerous dilution of the standing requirement. In any event, the anticipatory nature of the analysis necessary to reach the merits of Boeing's appeal buttresses the notion that the Court is using a dubious technique to gloss over a lack of finality.

The procedural implications of our decision today will, I fear, have a more far-reaching effect than the decision on the

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[4] Boeing's only interest in the funds now held in escrow is its assertion that the unclaimed portion of the judgment eventually will revert to it. But respondents have argued with some force that the unclaimed funds will eventually escheat to the State of New York. See N. Y. Aband. Prop. Law § 1200 (McKinney 1944). In fact, the Attorney General of New York already has presented such a claim to the District Court. See Brief for Respondents filed by Stuart D. Wechsler 23. If the Attorney General and respondents are correct, then Boeing has no more standing to press its appeal than would a losing defendant have standing to contest the division of an award between plaintiff and his attorney pursuant to a contingent-fee arrangement.

Although respondents have not challenged Boeing's standing, we are obligated to consider the issue *sua sponte*, if necessary. See, *e. g.*, *Juidice* v. *Vail*, 430 U. S. 327, 331 (1977).

propriety of the application of the common-fund rule for allowing fees. Were I an attorney representing a party in common-fund litigation at a juncture similar to that encountered by Boeing prior to its appeal, I would be quite confused about the propriety of an immediate appeal, either on the merits of the main cause of action or on the details of an impending assessment of fees. Fearful that, by waiting for a "final order" in the strict sense, I might forfeit my right to appeal certain aspects of the litigation, cf. *Swanson* v. *American Consumer Industries, Inc.*, I probably would err in favor of filing an immediate appeal on whatever aspects of the case were bothersome at that time.[5] From the standpoint of the federal appellate courts, such uncertainty can only result in numerous interlocutory, precautionary appeals.

In sum, I believe that the District Court's order on the division of the "common fund" lacks the finality necessary to support Boeing's appeal, and would remand this matter to the Court of Appeals with instructions to dismiss the appeal. I therefore dissent.

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[5] The potential for confusion is even greater outside the context of common-fund litigation. See n. 3, *supra*.

NORFOLK & WESTERN RAILWAY CO. *v.* LIEPELT, ADMINISTRATRIX

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

No. 78-1323. Argued November 5, 1979—Decided February 19, 1980

Held: In a wrongful-death action brought under the Federal Employers' Liability Act in an Illinois court, the trial court erred in excluding evidence offered by petitioner-defendant to show the effect of income taxes on the decedent's estimated future earnings, and in refusing petitioner's requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." Pp. 493–498.

62 Ill. App. 3d 653, 378 N. E. 2d 1232, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 498.

Howard J. Trienens argued the cause for petitioner. With him on the briefs were *Robert L. Landess* and *Tobin M. Richter.*

Richard S. Fleisher argued the cause for respondent. With him on the brief was *Sidney Z. Karasik.**

MR. JUSTICE STEVENS delivered the opinion of the Court.

In cases arising under the Federal Employers' Liability Act,[1] most trial judges refuse to allow the jury to receive evidence

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**Francis D. Morrissey, Gus A. Svolos, Patrick F. Healy, Jr.*, and *John T. Rank* filed a brief for the National Association of Railroad Trial Counsel as *amicus curiae* urging reversal.

Edward J. Kionka and *Sheldon S. Cohen* filed a brief for the Association of Trial Lawyers of America as *amicus curiae* urging affirmance.

Edward I. Pollock and *Leonard Sacks* filed a brief for the Alabama Trial Lawyers Association et al. as *amici curiae.*

[1] 35 Stat. 65, as amended, 45 U. S. C. § 51 *et seq.*

or instruction concerning the impact of federal income taxes on the amount of damages to be awarded. Because the prevailing practice developed at a time when federal taxes were relatively insignificant, and because some courts are now following a different practice, we decided to answer the two questions presented by the certiorari petition in this wrongful-death action: (1) whether it was error to exclude evidence of the income taxes payable on the decedent's past and estimated future earnings; and (2) whether it was error for the trial judge to refuse to instruct the jury that the award of damages would not be subject to income taxation.

In 1973, a fireman employed by petitioner suffered fatal injuries in a collision caused by petitioner's negligence.[2] Respondent, as administratrix of the fireman's estate, brought suit under the FELA to recover the damages that his survivors suffered as a result of his death. In 1976, after a full trial in the Circuit Court of Cook County, the jury awarded respondent $775,000. On appeal, the Appellate Court of Illinois held that it was "not error to refuse to instruct a jury as to the nontaxability of an award" and also that it was "not error to exclude evidence of the effect of income taxes on future earnings of the decedent." 62 Ill. App. 3d 653, 669, 378 N. E. 2d 1232, 1245 (1978). The Illinois Supreme Court denied leave to appeal.[3]

The evidence supporting the damages award included biographical data about the decedent and his family and the expert testimony of an economist. The decedent, a 37-year-old man, was living with his second wife and two young children and was contributing to the support of two older children by his first marriage. His gross earnings in the 11 months prior to his death on November 22, 1973, amounted to $11,988.

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[2] The issue of liability was vigorously contested at the trial and was the subject of extensive consideration by the Appellate Court of Illinois, First District. See 62 Ill. App. 3d 653, 378 N. E. 2d 1232 (1978). No aspect of that issue, however, is now before us.

[3] App. to Pet. for Cert. A27–A28.

Assuming continued employment, those earnings would have amounted to $16,828.26 in 1977.

The expert estimated that the decedent's earnings would have increased at a rate of approximately five percent per year, which would have amounted to $51,600 in the year 2000, the year of his expected retirement. The gross amount of those earnings, plus the value of the services he would have performed for his family, less the amounts the decedent would have spent upon himself, produced a total which, when discounted to present value at the time of trial, amounted to $302,000.

Petitioner objected to the use of gross earnings, without any deduction for income taxes, in respondent's expert's testimony and offered to prove through the testimony of its own expert, an actuary, that decedent's federal income taxes during the years 1973 through 2000 would have amounted to about $57,000. Taking that figure into account, and making different assumptions about the rate of future increases in salary and the calculation of the present value of future earnings, petitioner's expert computed the net pecuniary loss at $138,327. As already noted, the jury returned a verdict of $775,000.

Petitioner argues that the jury must have assumed that its award was subject to federal income taxation; otherwise, it is argued, the verdict would not have exceeded respondent's expert's opinion by such a large amount.[4] For that reason, petitioner contends that it was prejudiced by the trial judge's refusal to instruct the jury that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award."

Whether it was error to refuse that instruction, as well as the question whether evidence concerning the federal taxes on

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[4] Respondent argues that the excess is adequately explained by the jury's estimate of the pecuniary value of the guidance, instruction, and training that the decedent would have provided to his children.

the decedent's earnings was properly excluded, is a matter governed by federal law. It has long been settled that questions concerning the measure of damages in an FELA action are federal in character. See, *e. g., Michigan Central R. Co.* v. *Vreeland,* 227 U. S. 59. This is true even if the action is brought in state court. See, *e. g., Chesapeake & Ohio R. Co.* v. *Kelly,* 241 U. S. 485, 491.[5] In this case the Appellate Court of Illinois recognized that the practice then being followed in Illinois was subject to change when this Court addresses the issue.[6] We do so now, first considering the evidence question and then the proposed instruction.

I

In a wrongful-death action under the FELA, the measure of recovery is "the damages . . . [that] flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co.* v. *Vreeland, supra,* at 70. The amount of money that a wage earner is able to contribute to the support of his family is unquestionably affected by the amount of the tax he must pay to the Federal Government. It is his after-tax income, rather than his gross income before taxes, that provides the only realistic measure of his ability to support his family. It fol-

[5] One of the purposes of the Federal Employers' Liability Act was to "create uniformity throughout the Union" with respect to railroads' financial responsibility for injuries to their employees. H. R. Rep. No. 1386, 60th Cong., 1st Sess., 3 (1908). See also *Dice* v. *Akron, C. & Y. R. Co.,* 342 U. S. 359, 362; *Brady* v. *Southern R. Co.,* 320 U. S. 476, 479; Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St. L. J. 384 (1956).

[6] "The Supreme Court of the United States has not spoken on this issue. Absent an authoritative pronouncement by that court we will follow the decisions of our own supreme court in *Raines* v. *New York Central R. R. Co.* (1972), 51 Ill. 2d 428, 430, 283 N. E. 2d 230, *cert. denied* (1972), 409 U. S. 983, . . . and *Hall* v. *Chicago & North Western Ry. Co.* (1955), 5 Ill. 2d 135, 149–52, 125 N. E. 2d 77. . . ." 62 Ill. App. 3d, at 668–669, 378 N. E. 2d, at 1245.

lows inexorably that the wage earner's income tax is a relevant factor in calculating the monetary loss suffered by his dependents when he dies.

Although federal courts have consistently received evidence of the amount of the decedent's personal expenditures, see, *e. g., Kansas City S. R. Co.* v. *Leslie,* 238 U. S. 599, 604, and have required that the estimate of future earnings be reduced by "taking account of the earning power of the money that is presently to be awarded," *Chesapeake & Ohio R. Co.* v. *Kelly, supra,* at 489, they have generally not considered the payment of income taxes as tantamount to a personal expenditure and have regarded the future prediction of tax consequences as too speculative and complex for a jury's deliberations. See, *e. g., Johnson* v. *Penrod Drilling Co.,* 510 F. 2d 234, 236–237 (CA5 1975), cert. denied, 423 U. S. 839.

Admittedly there are many variables that may affect the amount of a wage earner's future income-tax liability. The law may change, his family may increase or decrease in size, his spouse's earnings may affect his tax bracket, and extra income or unforeseen deductions may become available. But future employment itself, future health, future personal expenditures, future interest rates, and future inflation are also matters of estimate and prediction. Any one of these issues might provide the basis for protracted expert testimony and debate. But the practical wisdom of the trial bar and the trial bench has developed effective methods of presenting the essential elements of an expert calculation in a form that is understandable by juries that are increasingly familiar with the complexities of modern life. We therefore reject the notion that the introduction of evidence describing a decedent's estimated after-tax earnings is too speculative or complex for a jury.[7]

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[7] This is not to say, however, that introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating

Respondent argues that if this door is opened, other equally relevant evidence must also be received. For example, she points out that in discounting the estimate of future earnings to its present value, the tax on the income to be earned by the damages award is now omitted.[8] Logically, it would certainly seem correct that this amount, like future wages, should be estimated on an after-tax basis. But the fact that such an after-tax estimate, if offered in proper form, would also be admissible does not persuade us that it is wrong to use after-tax figures instead of gross earnings in projecting what the decedent's financial contributions to his survivors would have been had this tragic accident not occurred.

Respondent also argues that evidence concerning costs of litigation, including her attorney's fees, is equally pertinent to a determination of what amount will actually compensate the survivors for their monetary loss. In a sense this is, of course, true. But the argument that attorney's fees must be added to a plaintiff's recovery if the award is truly to make him whole is contrary to the generally applicable "American Rule." See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 247. The FELA, however, unlike a number of other federal statutes,[9] does not authorize recovery of attorney's fees by the successful litigant. Only if the Congress were to provide for such a recovery would it be proper to consider them. In any event, it surely is not proper for the Judiciary to ignore the demonstrably relevant factor of income tax in measuring damages in order to offset

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the award would be *de minimis*, introduction of the evidence may cause more confusion than it is worth. Cf. Fed. Rule Evid. 403.

[8] See *McWeeney* v. *New York, N. H. & H. R. Co.*, 282 F. 2d 34, 37 (CA2 1960), cert. denied, 364 U. S. 870.

[9] See Civil Rights Act of 1964, Tit. VII, § 706 (k), 78 Stat. 261, 42 U. S. C. § 2000e–5 (k); Clayton Act, § 4, 38 Stat. 731, 15 U. S. C. § 15; and numerous others collected in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S., at 260–261, n. 33.

what may be perceived as an undesirable or unfair rule regarding attorney's fees.[10]

II

Section 104 (a)(2) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a)(2), provides that the amount of any damages received on account of personal injuries is not taxable income.[11] The section is construed to apply to wrongful-death awards; they are not taxable income to the recipient.[12]

Although the law is perfectly clear, it is entirely possible that the members of the jury may assume that a plaintiff's recovery in a case of this kind will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated. The Missouri Supreme Court expressed the opinion that "it is reasonable to assume the average juror would believe [that its

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[10] The dissent takes the position that § 104 (a)(2) of the Internal Revenue Code, see nn. 11, 12, *infra*, which makes personal injury awards nontaxable, "appropriates for the tortfeasor a benefit intended to be conferred on the victim or his survivors." *Post*, at 498–499. But we see nothing in the language and are aware of nothing in the legislative history of § 104 (a)(2) to suggest that it has any impact whatsoever on the proper measure of damages in a wrongful-death action. Moreover, netting out the taxes that the decedent would have paid does not confer a benefit on the tortfeasor any more than netting out the decedent's personal expenditures. Both subtractions are required in order to determine "the pecuniary benefits which the beneficiaries might have reasonably received. . . ." *Michigan Central R. Co.* v. *Vreeland*, 227 U. S. 59, 70.

[11] The statute contains an exception for the reimbursement of medical expenses that have been taken as a deduction. The section provides in relevant part:

"Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

. . . . . .

(2) the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . ."

[12] See Rev. Rul. 54–19, 1954–1 Cum. Bull. 179.

verdict will] be subject to such taxes." *Dempsey* v. *Thompson*, 363 Mo. 339, 346, 251 S. W. 2d 42, 45 (1952). And Judge Aldisert, writing for the Third Circuit, agreed:

> "We take judicial notice of the 'tax consciousness' of the American public. Yet, we also recognize, as did the court in Dempsey v. Thompson, 363 Mo. 339, 251 S. W. 2d 42 (1952), that few members of the general public are aware of the special statutory exception for personal injury awards contained in the Internal Revenue Code.
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> " '[T]here is always danger that today's tax-conscious juries may assume (mistakenly of course) that the judgment will be taxable and therefore make their verdict big enough so that plaintiff would get what they think he deserves after the imaginary tax is taken out of it.'
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> "II Harper & James, The Law of Torts § 25.12, at 1327–28 (1956)." (Footnote omitted.) *Domeracki* v. *Humble Oil & Refining Co.*, 443 F. 2d 1245, 1251 (1971), cert. denied, 404 U. S. 883.

A number of other commentators have also identified that risk.[13]

In this case the respondent's expert witness computed the amount of pecuniary loss at $302,000, plus the value of the care and training that decedent would have provided to his young children; the jury awarded damages of $775,000. It is surely not fanciful to suppose that the jury erroneously believed that a large portion of the award would be payable to the Federal Government in taxes, and that therefore it improperly inflated the recovery. Whether or not this specu-

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[13] See, *e. g.*, Burns, A Compensation Award for Personal Injury or Wrongful Death Is Tax-Exempt: Should We Tell the Jury?, 14 DePaul L. Rev. 320 (1965); Feldman, Personal Injury Awards: Should Tax-Exempt Status Be Ignored?, 7 Ariz. L. Rev. 272 (1966); Nordstrom, Income Taxes and Personal Injury Awards, 19 Ohio St. L. J. 212 (1958).

lation is accurate, we agree with petitioner that, as Judge Ely wrote for the Ninth Circuit,

> "[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus overcompensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable." *Burlington Northern, Inc.* v. *Boxberger*, 529 F. 2d 284, 297 (1975).

We hold that it was error to refuse the requested instruction in this case. That instruction was brief and could be easily understood. It would not complicate the trial by making additional qualifying or supplemental instructions necessary. It would not be prejudicial to either party, but would merely eliminate an area of doubt or speculation that might have an improper impact on the computation of the amount of damages.

The judgment is reversed, and the case is remanded to the Appellate Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE MARSHALL joins, dissenting.

In this action for wrongful death arising under the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60, the Court today holds that if an award is granted, federal income taxes on the decedent's lost earnings are to be taken into account and are to reduce the amount of the award. The Court further holds that, on request, the jury must be instructed that the award is not subject to federal income tax.

I agree with neither ruling. In my view, by mandating adjustment of the award by way of reduction for federal income taxes that would have been paid by the decedent on his earnings, the Court appropriates for the tortfeasor a bene-

fit intended to be conferred on the victim or his survivors. And in requiring that the jury be instructed that a wrongful-death award is not subject to federal income tax, the Court opens the door for a variety of admonitions to the jury not to "misbehave," and unnecessarily interjects what is now to be federal law into the administration of a trial in a state court.

In this day of substantial income taxes, one is sorely tempted, in jury litigation, to accept the propriety of admitting evidence as to a tort victim's earnings *net* after estimated income taxes, and of instructing the jury that an award will be tax-free. This, it could be urged, is only common sense and a recognition of financial realities.

Ordinarily, however, the effect of an income tax upon the recipient of a payment is of no real or ultimate concern to the payer. Apart from required withholding, it just is not the payer's responsibility or, indeed, "any of his business." The concept of "net after taxes" and the omnipresence of the tax collector, to be sure, are present facts of life and are within the constant awareness of both recipient and payer. But these factors do not change the basic character of an award for damages, whether that award be one to compensate the surviving victim for his injury, or one to compensate the deceased victim's survivors, by way of statutory wrongful-death benefit, for their loss. The income tax effect should flow and be retained in its own channel. Surely, it should not operate to assist the tortfeasor by way of a benefit, perhaps even a windfall.

I

The employer-petitioner argues, and the Court holds, that federal income taxes that would have been paid by the deceased victim must be subtracted in computing the amount of the wrongful-death award. Were one able to ignore and set aside the uncertainties, estimates, assumptions, and complexities involved in computing and effectuating that subtraction, this might not be an unreasonable legislative proposition

in a compensatory tort system. Neither petitioner nor the Court, however, recognizes that the premise of such an argument is the nontaxability, under the Internal Revenue Code, of the wrongful-death award itself.

By not taxing the award, Congress has bestowed a benefit.[1] Although the parties disagree over the origin of the tax-free status of the wrongful-death award,[2] it is surely clear that the lost earnings could be taxed as income. Cf. *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 430–431 (1955). See generally M. Chirelstein, Federal Income Taxation 39–40 (1977). In my view, why Congress created this benefit under one statute is relevant in deciding where the benefit should be allocated under another statute enacted by Congress.[3]

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[1] The parties agree that these awards are not taxable. Of course, it would not be in the interest of either party to take the position that the award is taxable.

[2] Respondent maintains that a wrongful-death award is within the exclusion of § 104 (a) (2) of the Internal Revenue Code of 1954, 26 U. S. C. § 104 (a) (2), which provides that "gross income does not include . . . the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness." Brief for Respondent 8–9, and n. 2. Petitioner, on the other hand, contends that a wrongful-death award is not, in the words of the statute, "received . . . on account of personal injuries." Petitioner points to an early ruling that wrongful-death damages are not within the Code's definition of income because they merely replace contributions the decedent's relatives would have received from the decedent. I. T. 2420, VII–2 Cum. Bull. 123 (1928); see Rev. Rul. 54–19, 1954–1 Cum. Bull. 179. Alternatively, petitioner argues that even if wrongful-death damages are covered by § 104 (a) (2), Congress' purpose in enacting that subsection was not to aid tort victims. Rather, § 104 (a) (2) can be traced to Congress' concern in 1918 that personal injury damages were not income within the meaning of the Sixteenth Amendment, citing H. R. Rep. No. 767, 65th Cong., 2d Sess., 9–10 (1918). Brief for Petitioner 31–32, n. 23.

[3] Petitioner argues that a decision in this case that would rest on Congress' purpose not to subject wrongful-death awards to federal income taxation would "fundamentally alter all forms of injury compensation in this country," Reply Brief for Petitioner 10–11, since this nontaxability

While Congress has not articulated its reasons for not taxing a wrongful-death award, it is highly unlikely that it intended to confer this benefit on the tortfeasor. Two more probable purposes for the exclusion are apparent. First, taxing the award could involve the same uncertainties and complexities noted by respondent and the majority of the courts of this country as a reason for not taking income taxes into account in computing the award. Congress may have decided that it is simply not worthwhile to enact a complex and administratively burdensome system in order to approximate the tax treatment of the income if, in fact, it had been earned over a period of time by the decedent. Second, Congress may have intended to confer a humanitarian benefit on the victim or victims of the tort. One District Court has reasoned:

> "The court can divine no societal purpose that would be furthered by awarding wrongdoing defendants with the benefit of this Congressional largesse. A societal purpose would be served by benefiting innocent victims of tortious conduct. Indeed, since the victims' chances of needing public relief are thereby diminished, this concern would be greater, not less, in the case of death, where the loss of earning capacity is total. This court therefore concludes that Congress, as with all exemptions under Section 104, '. . . intended to relieve a taxpayer who has the misfortune to become ill or injured. . . .'" *Huddell* v. *Levin*, 395 F. Supp. 64, 87 (NJ 1975),[4] quoting *Epmeier* v. *United States*, 199 F. 2d 508, 511 (CA7 1952), quoted in turn in *Haynes* v. *United States*, 353 U. S. 81, 84–85, n. 3 (1957).

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is not limited to awards under the FELA. My position, however, is merely that the policies embodied in one federal statute are relevant in aid of the interpretation of another federal statute. Absent a more explicit statement of Congress' intent, I would not infer a congressional purpose to override the States' traditional power to define the measure of damages applicable to state-created causes of action.

[4] Vacated on other grounds, 537 F. 2d 726 (CA3 1976).

See also Comment, Income Tax Effects on Personal Injury Recoveries, 30 La. L. Rev. 672, 685 (1970); Note, 69 Harv. L. Rev. 1495, 1496 (1956); Note, Taxation of Damage Recoveries from Litigation, 40 Cornell L. Q. 345, 346 (1955).

Whichever of these concerns it was that motivated Congress, transfer of the tax benefit to the FELA tortfeasor-defendant is inconsistent with that purpose. If Congress felt that it was not worth the effort to estimate the decedent's prospective tax liability on behalf of the public fisc, it is unlikely that it would want to require this effort on behalf of the tortfeasor. And Congress would not confer a humanitarian benefit on tort victims or their survivors in the Internal Revenue Code, only to take it away from victims or their survivors covered by the FELA. I conclude, therefore, that any income tax effect on lost earnings should not be considered in the computation of a damages award under the FELA.

II

The Court concludes that, as a matter of federal law, the jury in an FELA case must be instructed, on request, that the damages award is not taxable. This instruction is mandated, it is said, because "it is entirely possible that the members of the jury may assume that a plaintiff's recovery . . . will be subject to federal taxation, and that the award should be increased substantially in order to be sure that the injured party is fully compensated." *Ante,* at 496. The Court finds it "surely not fanciful to suppose" that the jury acted on that assumption in this case. *Ante,* at 497.

The required instruction is purely cautionary in nature It does not affect the determination of liability or the measure of damages. It does nothing more than call a basically irrelevant factor to the jury's attention, and then directs the jury to forget that matter. Even if federal law governed such an admonition to the jury not to misbehave, the instruction required by the Court seems to me to be both unwise

and unjustified, and almost an affront to the practical wisdom of the jury.

It also is "entirely possible" that the jury "may" increase its damages award in the belief that the defendant is insured, or that the plaintiff will be obligated for substantial attorney's fees, or that the award is subject to state (as well as federal) income tax, or on the basis of any number of other extraneous factors. Charging the jury about every conceivable matter as to which it should not misbehave or miscalculate would be burdensome and could be confusing. Yet the Court's decision today opens the door to that possibility. There certainly is no evidence in this record to indicate that the jury is any more likely to act upon an erroneous assumption about an award's being subject to federal income tax than about any other collateral matter. Although the Court suggests that the difference in the expert's estimation of the pecuniary loss and the total amount of the award represents inflation of the award for federal income taxes, *ante*, at 496–498, this is pure surmise. The jury was instructed that it could compensate for factors on which experts could not place a precise dollar value, and it is "entirely possible" that these, instead, were the basis of the award.

In any event, it has long been settled that the giving of cautionary instructions is governed by state law when an FELA action is brought in state court. "[Q]uestions of procedure and evidence [are] to be determined according to the law of the forum [in cases arising under the FELA]." *Chesapeake & Ohio R. Co.* v. *Kelly*, 241 U. S. 485, 491 (1916). This Court, to be sure, has asserted federal control over a number of incidents of state trial practice that might appear to be procedural, and has done so out of concern, apparently, for protecting the rights of FELA plaintiffs. See, *e. g.*, *Brown* v. *Western R. of Alabama*, 338 U. S. 294 (1949) (a State cannot apply, in an FELA case, its usual rule that pleadings are construed against the pleader); *Dice* v. *Akron, C. & Y. R. Co.*,

342 U. S. 359 (1952) (FELA plaintiff is entitled to a jury trial in state court notwithstanding a contrary state rule); C. Wright, Law of Federal Courts 195–196 (3d ed. 1976); Hill, Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?, 17 Ohio St. L. J. 384 (1956). I agree, of course, that state rules that interfere with federal policy are to be rejected, even if they might be characterized as "procedural." See, *e. g.*, Note, State Enforcement of Federally Created Rights, 73 Harv. L. Rev. 1551, 1560–1561 (1960). See generally Note, Procedural Protection for Federal Rights in State Courts, 30 U. Cin. L. Rev. 184 (1961). I cannot conclude, however, that a purely cautionary instruction to the jury not to misbehave implicates any federal interest. This issue truly can be characterized as one of the "ordinary incidents of state procedure," *Dickinson* v. *Stiles*, 246 U. S. 631, 633 (1918), which should be governed by state law.

Since the law of Illinois, where this case arose, is that it is not error to refuse to instruct the jury as to the nontaxability of the award, *Raines* v. *New York Central R. Co.*, 51 Ill. 2d 428, 430, 283 N. E. 2d 230, 232, cert. denied, 409 U. S. 983 (1972), and since I believe the trial court correctly excluded evidence of the prospective tax liability of the deceased victim, I would affirm the judgment of the Appellate Court of Illinois.

CROWELL, SECRETARY OF STATE OF TENNESSEE, ET AL. *v.* MADER ET AL.

ON PETITION FOR REHEARING

No. 78–1780. Judgment vacated and case remanded October 1, 1979—Rehearing granted and case decided February 19, 1980

After the State had appealed to this Court from the District Court's judgment invalidating a legislative senatorial districting plan, the Tennessee Legislature enacted a new plan. This Court then vacated the District Court's judgment and directed that the action be dismissed as moot.

Held: Since the recent legislation did not moot the entire case, but only the issue raised on appeal, this Court's prior order is vacated and, in lieu thereof, the District Court's judgment is vacated without prejudice to such further proceedings in that court as may be appropriate.

Rehearing granted; vacated.

PER CURIAM.

The petition for rehearing is granted.

In *Kopald* v. *Carr*, 343 F. Supp. 51 (MD Tenn. 1972), the District Court applied this Court's earlier holding in *Baker* v. *Carr*, 369 U. S. 186 (1962), to invalidate two senatorial districting plans. That decision resulted in the formulation of a so-called court ordered "Kopald Plan." That plan was superseded by a 1973 legislative plan.

In this litigation the District Court invalidated the 1973 legislative plan. It enjoined the defendants from conducting any elections pursuant to that plan and retained jurisdiction to review whatever substitute the Tennessee General Assembly might enact prior to June 1, 1979, or, if necessary, to reinstate the 1972 "Kopald Plan." The court further ordered a hearing to award fees to plaintiffs' counsel.

In response to the State's appeal to this Court, appellees pointed out that the legislature had enacted a new plan effective on June 6, 1979, argued that the controversy over the

validity of the 1973 legislative plan had therefore become moot, and requested that the appeal therefore be dismissed. This Court, following a practice that is appropriate when an entire case has become moot but which is inappropriate when only the issues raised on appeal have been resolved, entered an order directing that the judgment of the District Court be vacated and that the entire action be dismissed as moot. *Post*, p. 806.

The recent legislation did not moot the entire case, but only the issues raised on appeal. Appellees may still wish to attack the newly enacted legislation or apply for attorney's fees. We therefore vacate our prior order. In lieu thereof, we direct that the judgment of the District Court be vacated without prejudice to such further proceedings in the District Court as may be appropriate. See *Diffenderfer* v. *Central Baptist Church*, 404 U. S. 412 (1972).

It is so ordered.

SNEPP *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 78–1871. Decided February 19, 1980*

Held: A former employee of the Central Intelligence Agency, who had agreed not to divulge classified information without authorization and not to publish any information relating to the Agency without prepublication clearance, breached a fiduciary obligation when he published a book about certain Agency activities without submitting his manuscript for prepublication review. The proceeds of his breach are impressed with a constructive trust for the benefit of the Government.

Certiorari granted; 595 F. 2d 926, reversed in part and remanded.

PER CURIAM.

In No. 78–1871, Frank W. Snepp III seeks review of a judgment enforcing an agreement that he signed when he accepted employment with the Central Intelligence Agency (CIA). He also contends that punitive damages are an inappropriate remedy for the breach of his promise to submit all writings about the Agency for prepublication review. In No. 79–265, the United States conditionally cross petitions from a judgment refusing to find that profits attributable to Snepp's breach are impressed with a constructive trust. We grant the petitions for certiorari in order to correct the judgment from which both parties seek relief.

I

Based on his experiences as a CIA agent, Snepp published a book about certain CIA activities in South Vietnam. Snepp published the account without submitting it to the Agency for prepublication review. As an express condition of his employment with the CIA in 1968, however, Snepp had

*Together with No. 79–265, *United States* v. *Snepp*, also on petition for certiorari to the same court.

executed an agreement promising that he would "not . . . publish . . . any information or material relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval by the Agency." App. to Pet. for Cert. in No. 78–1871, p. 59a. The promise was an integral part of Snepp's concurrent undertaking "not to disclose any classified information relating to the Agency without proper authorization." *Id.*, at 58a.[1] Thus, Snepp had pledged not to divulge *classified* information and not to publish *any* information without prepublication clearance. The Government brought this suit to enforce Snepp's agreement. It sought a declaration that Snepp had breached the contract, an injunction requiring Snepp to submit future writings for prepublication review, and an order imposing a constructive trust for the Government's benefit on all profits that Snepp might earn from publishing the book in violation of his fiduciary obligations to the Agency.[2]

The District Court found that Snepp had "willfully, deliberately and surreptitiously breached his position of trust with the CIA and the [1968] secrecy agreement" by publishing his book without submitting it for prepublication review. 456 F. Supp. 176, 179 (ED Va. 1978). The court also found that Snepp deliberately misled CIA officials into believing that he would submit the book for prepublication clearance. Finally, the court determined as a fact that publication of the book had "caused the United States irreparable harm and loss."

[1] Upon the eve of his departure from the Agency in 1976, Snepp also executed a "termination secrecy agreement." That document reaffirmed his obligation "never" to reveal "any classified information, or any information concerning intelligence or CIA that has not been made public by CIA . . . without the express written consent of the Director of Central Intelligence or his representative." App. to Pet. for Cert. in No. 78–1871, p. 61a.

[2] At the time of suit, Snepp already had received about $60,000 in advance payments. His contract with his publisher provides for royalties and other potential profits. 456 F. Supp. 176, 179 (ED Va. 1978).

Id., at 180. The District Court therefore enjoined future breaches of Snepp's agreement and imposed a constructive trust on Snepp's profits.

The Court of Appeals accepted the findings of the District Court and agreed that Snepp had breached a valid contract.[3] It specifically affirmed the finding that Snepp's failure to submit his manuscript for prepublication review had inflicted "irreparable harm" on intelligence activities vital to our national security. 595 F. 2d 926, 935 (CA4 1979). Thus, the court upheld the injunction against future violations of Snepp's prepublication obligation. The court, however, concluded that the record did not support imposition of a constructive trust. The conclusion rested on the court's percep-

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[3] The Court of Appeals and the District Court rejected each of Snepp's defenses to the enforcement of his contract. 595 F. 2d 926, 931–934 (CA4 1979); 456 F. Supp., at 180–181. In his petition for certiorari, Snepp relies primarily on the claim that his agreement is unenforceable as a prior restraint on protected speech.

When Snepp accepted employment with the CIA, he voluntarily signed the agreement that expressly obligated him to submit any proposed publication for prior review. He does not claim that he executed this agreement under duress. Indeed, he voluntarily reaffirmed his obligation when he left the Agency. We agree with the Court of Appeals that Snepp's agreement is an "entirely appropriate" exercise of the CIA Director's statutory mandate to "protec[t] intelligence sources and methods from unauthorized disclosure," 50 U. S. C. § 403 (d)(3). 595 F. 2d, at 932. Moreover, this Court's cases make clear that—even in the absence of an express agreement—the CIA could have acted to protect substantial government interests by imposing reasonable restrictions on employee activities that in other contexts might be protected by the First Amendment. *CSC* v. *Letter Carriers*, 413 U. S. 548, 565 (1973); see *Brown* v. *Glines*, *ante*, p. 348; *Buckley* v. *Valeo*, 424 U. S. 1, 25–28 (1976); *Greer* v. *Spock*, 424 U. S. 828 (1976); *id.*, at 844–848 (POWELL, J., concurring); *Cole* v. *Richardson*, 405 U. S. 676 (1972). The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service. See *infra*, at 511–512. The agreement that Snepp signed is a reasonable means for protecting this vital interest.

tion that Snepp had a First Amendment right to publish unclassified information and the Government's concession—for the purposes of this litigation—that Snepp's book divulged no classified intelligence. *Id.*, at 935–936.[4] In other words, the court thought that Snepp's fiduciary obligation extended only to preserving the confidentiality of classified material. It therefore limited recovery to nominal damages and to the possibility of punitive damages if the Government—in a jury trial—could prove tortious conduct.

Judge Hoffman, sitting by designation, dissented from the refusal to find a constructive trust. The 1968 agreement, he wrote, "was no ordinary contract; it gave life to a fiduciary relationship and invested in Snepp the trust of the CIA." *Id.*, at 938. Prepublication clearance was part of Snepp's undertaking to protect confidences associated with his trust. Punitive damages, Judge Hoffman argued, were both a speculative and inappropriate remedy for Snepp's breach. We agree with Judge Hoffman that Snepp breached a fiduciary obligation and that the proceeds of his breach are impressed with a constructive trust.

II

Snepp's employment with the CIA involved an extremely high degree of trust. In the opening sentence of the agreement that he signed, Snepp explicitly recognized that he was entering a trust relationship.[5] The trust agreement specifi-

[4] The Government's concession distinguished this litigation from *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972). There, the Government claimed that a former CIA employee intended to violate his agreement not to publish any *classified* information. 466 F. 2d, at 1313. *Marchetti* therefore did not consider the appropriate remedy for the breach of an agreement to submit *all* material for prepublication review. By relying on *Marchetti* in this litigation, the Court of Appeals overlooked the difference between Snepp's breach and the violation at issue in *Marchetti*.

[5] The first sentence of the 1968 agreement read: "I, Frank W. Snepp, III, understand that upon entering duty with the Central Intelligence

cally imposed the obligation not to publish *any* information relating to the Agency without submitting the information for clearance. Snepp stipulated at trial that—after undertaking this obligation—he had been "assigned to various positions of trust" and that he had been granted "frequent access to classified information, including information regarding intelligence sources and methods." 456 F. Supp., at 178.[6] Snepp published his book about CIA activities on the basis of this background and exposure. He deliberately and surreptitiously violated his obligation to submit all material for prepublication review. Thus, he exposed the classified information with which he had been entrusted to the risk of disclosure.

Whether Snepp violated his trust does not depend upon whether his book actually contained classified information. The Government does not deny—as a general principle—Snepp's right to publish unclassified information. Nor does it contend—at this stage of the litigation—that Snepp's book contains classified material. The Government simply claims that, in light of the special trust reposed in him and the agreement that he signed, Snepp should have given the CIA an opportunity to determine whether the material he proposed to publish would compromise classified information or sources. Neither of the Government's concessions undercuts its claim that Snepp's failure to submit to prepublication review was a breach of his trust.

Both the District Court and the Court of Appeals found that a former intelligence agent's publication of unreviewed material relating to intelligence activities can be detrimental

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Agency I am undertaking a position of trust in that Agency of the Government. . . ." App. to Pet. for Cert. in No. 78–1871, p. 58a.

[6] Quite apart from the plain language of the agreement, the nature of Snepp's duties and his conceded access to confidential sources and materials could establish a trust relationship. See 595 F. 2d, at 939 (Hoffman, J., concurring in part and dissenting in part). Few types of governmental employment involve a higher degree of trust than that reposed in a CIA employee with Snepp's duties.

to vital national interests even if the published information is unclassified. When a former agent relies on his own judgment about what information is detrimental, he may reveal information that the CIA—with its broader understanding of what may expose classified information and confidential sources—could have identified as harmful. In addition to receiving intelligence from domestically based or controlled sources, the CIA obtains information from the intelligence services of friendly nations[7] and from agents operating in foreign countries. The continued availability of these foreign sources depends upon the CIA's ability to guarantee the security of information that might compromise them and even endanger the personal safety of foreign agents.

Undisputed evidence in this case shows that a CIA agent's violation of his obligation to submit writings about the Agency for prepublication review impairs the CIA's ability to perform its statutory duties. Admiral Turner, Director of the CIA, testified without contradiction that Snepp's book and others like it have seriously impaired the effectiveness of American intelligence operations. He said:

> "Over the last six to nine months, we have had a number of sources discontinue work with us. We have had more sources tell us that they are very nervous about continuing work with us. We have had very strong complaints from a number of foreign intelligence services with whom we conduct liaison, who have questioned whether they should continue exchanging information with us, for fear it will not remain secret. I cannot esti-

[7] Every major nation in the world has an intelligence service. Whatever fairly may be said about some of its past activities, the CIA (or its predecessor the Office of Strategic Services) is an agency thought by every President since Franklin D. Roosevelt to be essential to the security of the United States and—in a sense—the free world. It is impossible for a government wisely to make critical decisions about foreign policy and national defense without the benefit of dependable foreign intelligence. See generally T. Powers, The Man Who Kept the Secrets (1979).

> mate to you how many potential sources or liaison arrangements have never germinated because people were unwilling to enter into business with us." 456 F. Supp., at 179–180.[8]

In view of this and other evidence in the record, both the District Court and the Court of Appeals recognized that Snepp's breach of his explicit obligation to submit his material—classified or not—for prepublication clearance has irreparably harmed the United States Government. 595 F. 2d, at 935; 456 F. Supp., at 180.[9]

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[8] In questioning the force of Admiral Turner's testimony, MR. JUSTICE STEVENS' dissenting opinion suggests that the concern of foreign intelligence services may not be occasioned by the hazards of allowing an agent like Snepp to publish whatever he pleases, but by the release of classified information or simply the disagreement of foreign agencies with our Government's classification policy. *Post*, at 522–523. MR. JUSTICE STEVENS' views in this respect not only find no support in the record, but they also reflect a misapprehension of the concern reflected by Admiral Turner's testimony. If in fact information is unclassified or in the public domain, neither the CIA nor foreign agencies would be concerned. The problem is to ensure *in advance*, and by proper procedures, that information detrimental to national interest is not published. Without a dependable prepublication review procedure, no intelligence agency or responsible Government official could be assured that an employee privy to sensitive information might not conclude on his own—innocently or otherwise—that it should be disclosed to the world.

The dissent argues that the Court is allowing the CIA to "censor" its employees' publications. *Post*, at 522. Snepp's contract, however, requires no more than a clearance procedure subject to judicial review. If Snepp, in compliance with his contract, had submitted his manuscript for review and the Agency had found it to contain sensitive material, presumably—if one accepts Snepp's present assertion of good intentions—an effort would have been made to eliminate harmful disclosures. Absent agreement in this respect, the Agency would have borne the burden of seeking an injunction against publication. See *Alfred A. Knopf, Inc.* v. *Colby*, 509 F. 2d 1362 (CA4), cert. denied, 421 U. S. 992 (1975); *United States* v. *Marchetti*, 466 F. 2d 1309 (CA4), cert. denied, 409 U. S. 1063 (1972).

[9] Although both the District Court and the Court of Appeals expressly found otherwise, MR. JUSTICE STEVENS says that "the interest in con-

III

The decision of the Court of Appeals denies the Government the most appropriate remedy for Snepp's acknowledged wrong. Indeed, as a practical matter, the decision may well leave the Government with no reliable deterrent against similar breaches of security. No one disputes that the actual damages attributable to a publication such as Snepp's generally are unquantifiable. Nominal damages are a hollow alternative, certain to deter no one. The punitive damages recoverable after a jury trial are speculative and unusual. Even if recovered, they may bear no relation to either the Government's irreparable loss or Snepp's unjust gain.

The Government could not pursue the only remedy that the Court of Appeals left it [10] without losing the benefit of the bargain it seeks to enforce. Proof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect. The trial of such a suit, before a jury if the defendant so elects, would subject the CIA and its

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fidentiality that Snepp's contract was designed to protect has not been compromised." *Post*, at 516–517. Thus, on the basis of a premise wholly at odds with the record, the dissent bifurcates Snepp's 1968 agreement and treats its interdependent provisions as if they imposed unrelated obligations. MR. JUSTICE STEVENS then analogizes Snepp's prepublication review agreement with the Government to a private employee's covenant not to compete with his employer. *Post*, at 518–520. A body of private law intended to preserve competition, however, simply has no bearing on a contract made by the Director of the CIA in conformity with his statutory obligation to "protec[t] intelligence sources and methods from unauthorized disclosure." 50 U. S. C. § 403 (d)(3).

[10] Judge Hoffman's dissent suggests that even this remedy may be unavailable if the Government must bring suit in a State that allows punitive damages only upon proof of compensatory damages. 595 F. 2d., at 940. The Court of Appeals majority, however, held as a matter of *federal* law that the nominal damages recoverable for any breach of a trust agreement will support an exemplary award. See *id.*, at 936, and n. 10, 937–938.

officials to probing discovery into the Agency's highly confidential affairs. Rarely would the Government run this risk. In a letter introduced at Snepp's trial, former CIA Director Colby noted the analogous problem in criminal cases. Existing law, he stated, "requires the revelation in open court of confirming or additional information of such a nature that the potential damage to the national security precludes prosecution." App. to Pet. for Cert. in No. 78–1871, p. 68a. When the Government cannot secure its remedy without unacceptable risks, it has no remedy at all.

A constructive trust, on the other hand, protects both the Government and the former agent from unwarranted risks. This remedy is the natural and customary consequence of a breach of trust.[11] It deals fairly with both parties by conforming relief to the dimensions of the wrong. If the agent secures prepublication clearance, he can publish with no fear of liability. If the agent publishes unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the

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[11] See *id.*, at 939 (Hoffman, J., concurring in part and dissenting in part). MR. JUSTICE STEVENS concedes that, even in the absence of a written contract, an employee has a fiduciary obligation to protect confidential information obtained during the course of his employment. *Post*, at 518. He also concedes that all personal profits gained from the exploitation of such information are impressed with a constructive trust in favor of the employer. *Post*, at 521. In this case, he seems to think that the common law would not treat information as "confidential" unless it were "classified." See, *e. g.*, *post*, at 518. We have thought that the common-law obligation was considerably more expansive. See, *e. g.*, Restatement (Second) of Agency §§ 396 (c), 400 and Comment *c*, 404 and Comments *b*, *d* (1958); 5 A. Scott, Trusts § 505 (3d ed. 1967). But since this case involves the breach of a trust agreement that specifically required the prepublication review of all information about the employer, we need not look to the common law to determine the scope of Snepp's fiduciary obligation.

breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain. The decision of the Court of Appeals would deprive the Government of this equitable and effective means of protecting intelligence that may contribute to national security. We therefore reverse the judgment of the Court of Appeals insofar as it refused to impose a constructive trust on Snepp's profits, and we remand the cases to the Court of Appeals for reinstatement of the full judgment of the District Court.

So ordered.

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

In 1968, Frank W. Snepp signed an employment agreement with the CIA in which he agreed to submit to the Agency any information he intended to publish about it for prepublication review.[1] The purpose of such an agreement, as the Fourth Circuit held, is not to give the CIA the power to censor its employees' critical speech, but rather to ensure that classified, nonpublic information is not disclosed without the Agency's permission. 595 F. 2d 926, 932 (1979); see also *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063.

In this case Snepp admittedly breached his duty to submit the manuscript of his book, Decent Interval, to the CIA for prepublication review. However, the Government has conceded that the book contains no classified, nonpublic material.[2] Thus, by definition, the interest in confidentiality

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[1] Snepp also signed a termination agreement in 1976 in which he made substantially the same commitment.

[2] In response to an interrogatory asking whether it contended that "*Decent Interval* contains classified information or any information concerning intelligence or CIA that has not been made public by CIA," the Government stated that "[f]or the purpose of this action, plaintiff does not so contend." Record Item No. 24, p. 14. Because of this concession, the District Judge sustained the Government's objections to defense efforts

that Snepp's contract was designed to protect has not been compromised. Nevertheless, the Court today grants the Government unprecedented and drastic relief in the form of a constructive trust over the profits derived by Snepp from the sale of the book. Because that remedy is not authorized by any applicable law and because it is most inappropriate for the Court to dispose of this novel issue summarily on the Government's conditional cross-petition for certiorari, I respectfully dissent.

I

The rule of law the Court announces today is not supported by statute, by the contract, or by the common law. Although Congress has enacted a number of criminal statutes punishing the unauthorized dissemination of certain types of classified information,[3] it has not seen fit to authorize the constructive trust remedy the Court creates today. Nor does either of the contracts Snepp signed with the Agency provide for any such remedy in the event of a breach.[4] The Court's *per curiam*

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to determine whether Decent Interval in fact contains information that the Government considers classified. See, *e. g.*, the testimony of Admiral Stansfield Turner, Director of the CIA, Tr. 135; and of Herbert Hetu, the CIA's Director of Public Affairs, Tr. 153.

[3] See, *e. g.*, 18 U. S. C. § 798, which imposes a prison term of 10 years and a $10,000 fine for knowingly and willfully publishing certain types of classified information; 18 U. S. C. § 794, which makes it a criminal offense punishable by life in prison to communicate national defense information to a foreign government; and 5 U. S. C. § 8312, which withdraws the right to Government retirement benefits from a person convicted of violating these statutes. See also Exec. Order No. 12065, 3 CFR 190 (1979), note following 50 U. S. C. § 401 (1976 ed., Supp. II), which provides administrative sanctions, including discharge, against employees who publish classified information. Thus, even in the absence of a constructive trust remedy, an agent like Snepp would hardly be free, as the majority suggests, "to publish whatever he pleases." *Ante*, at 513, n. 8.

[4] In both his original employment agreement and the termination agreement Snepp acknowledged the criminal penalties that might attach to any publication of classified information. In his employment agreement he also agreed that a breach of the agreement would be cause for termina-

opinion seems to suggest that its result is supported by a blend of the law of trusts and the law of contracts.[5] But neither of these branches of the common law supports the imposition of a constructive trust under the circumstances of this case.

Plainly this is not a typical trust situation in which a settlor has conveyed legal title to certain assets to a trustee for the use and benefit of designated beneficiaries. Rather, it is an employment relationship in which the employee possesses fiduciary obligations arising out of his duty of loyalty to his employer. One of those obligations, long recognized by the common law even in the absence of a written employment agreement, is the duty to protect confidential or "classified" information. If Snepp had breached that obligation, the common law would support the implication of a constructive trust upon the benefits derived from his misuse of confidential information.[6]

But Snepp did not breach his duty to protect confidential information. Rather, he breached a contractual duty, imposed in aid of the basic duty to maintain confidentiality, to

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tion of his employment. No other remedies were mentioned in either agreement.

[5] In a footnote, see *ante*, at 515, n. 11, the Court suggests that it need not look to the common law to support its holding because the case involves a written contract. But, inasmuch as the contract itself does not state what remedy is to be applied in the event of a breach, the common law is the only source of law to which we can look to determine what constitutes an appropriate remedy.

[6] See, *e. g.*, *Sperry Rand Corp.* v. *A-T-O, Inc.*, 447 F. 2d 1387, 1392 (CA4 1971) (Virginia law), cert. denied, 405 U. S. 1017; *Tlapek* v. *Chevron Oil Co.*, 407 F. 2d 1129 (CA8 1969) (Arkansas law); *Structural Dynamics Research Corp.* v. *Engineering Mechanics Research Corp.*, 401 F. Supp. 1102, 1120 (ED Mich. 1975) (Michigan law); Restatement (Second) of Agency § 396 (c) (1958) ("Unless otherwise agreed, after the termination of the agency, the agent: . . . (c) has a duty to account for profits made by the sale or use of trade secrets and other confidential information, whether or not in competition with the principal . . .").

obtain prepublication clearance. In order to justify the imposition of a constructive trust, the majority attempts to equate this contractual duty with Snepp's duty not to disclose, labeling them both as "fiduciary." I find nothing in the common law to support such an approach.

Employment agreements often contain covenants designed to ensure in various ways that an employee fully complies with his duty not to disclose or misuse confidential information. One of the most common is a covenant not to compete. Contrary to the majority's approach in this case, the courts have not construed such covenants broadly simply because they support a basic fiduciary duty; nor have they granted sweeping remedies to enforce them. On the contrary, because such covenants are agreements in restraint of an individual's freedom of trade, they are enforceable only if they can survive scrutiny under the "rule of reason." That rule, originally laid down in the seminal case of *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 24 Eng. Rep. 347 (1711), requires that the covenant be reasonably necessary to protect a legitimate interest of the employer (such as an interest in confidentiality), that the employer's interest not be outweighed by the public interest,[7] and that the covenant not be of any longer duration or wider geographical scope than necessary to protect the employer's interest.[8]

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[7] As the court held in *Herbert Morris, Ltd.* v. *Saxelby*, [1916] A. C. 688, 704, the employer's interest in protecting trade secrets does not outweigh the public interest in keeping the employee in the work force:

"[A]n employer can[not] prevent his employee from using the skill and knowledge in his trade or profession which he has learnt in the course of his employment by means of directions or instructions from the employer. That information and that additional skill he is entitled to use for the benefit of himself and the benefit of the public who gain the advantage of his having had such admirable instruction. The case in which the Court interferes for the purpose of protection is where use is made, not of the skill which the man may have acquired, but of the secrets of the trade or profession which he had no right to reveal to any one else. . . ."

[8] See, *e. g.*, *Briggs* v. *R. R. Donnelley & Sons Co.*, 589 F. 2d 39, 41 (CA1

The Court has not persuaded me that a rule of reason analysis should not be applied to Snepp's covenant to submit to prepublication review. Like an ordinary employer, the CIA has a vital interest in protecting certain types of information; at the same time, the CIA employee has a countervailing interest in preserving a wide range of work opportunities (including work as an author) and in protecting his First Amendment rights. The public interest lies in a proper accommodation that will preserve the intelligence mission of the Agency while not abridging the free flow of unclassified information. When the Government seeks to enforce a harsh restriction on the employee's freedom,[9] despite its admission that the interest the agreement was designed to protect—the confidentiality of classified information—has not been compromised, an equity court might well be persuaded that the case is not one in which the covenant should be enforced.[10]

1978) (Illinois law); *American Hot Rod Assn., Inc.* v. *Carrier*, 500 F. 2d 1269, 1277 (CA4 1974) (North Carolina law); *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, 492 F. 2d 279, 282 (CA4 1974) (Virginia law); *Mixing Equipment Co.* v. *Philadelphia Gear, Inc.*, 436 F. 2d 1308, 1312 (CA3 1971) (New York law); *Water Services, Inc.* v. *Tesco Chemicals, Inc.*, 410 F. 2d 163, 167 (CA5 1969) (Georgia law); Restatement (Second) of Contracts § 330 (Tent. Draft No. 12, Mar. 1, 1977).

[9] The covenant imposes a serious prior restraint on Snepp's ability to speak freely, see n. 17, *infra*, and is of indefinite duration and scope—factors that would make most similar covenants unenforceable. See, *e. g.*, *Alston Studios, Inc.* v. *Lloyd V. Gress & Associates*, *supra*, at 283 (holding void under Virginia law a covenant with no geographical limitation); *American Hot Rod Assn., Inc.* v. *Carrier*, *supra*, at 1279 (holding void under North Carolina law a covenant with no durational or geographical limitation); *E. L. Conwell & Co.* v. *Gutberlet*, 429 F. 2d 527, 528 (CA4 1970) (holding void under Maryland law a covenant with no durational or geographical limitation).

[10] The Court correctly points out that the Government may regulate certain activities of its employees that would be protected by the First Amendment in other contexts. *Ante*, at 509, n. 3. But none of the cases it cites involved a requirement that an employee submit all proposed public statements for prerelease censorship or approval. The Court has not pre-

But even assuming that Snepp's covenant to submit to prepublication review should be enforced, the constructive trust imposed by the Court is not an appropriate remedy. If an employee has used his employer's confidential information for his own personal profit, a constructive trust over those profits is obviously an appropriate remedy because the profits are the direct result of the breach. But Snepp admittedly did not use confidential information in his book; nor were the profits from his book in any sense a product of his failure to submit the book for prepublication review. For, even if Snepp had submitted the book to the Agency for prepublication review, the Government's censorship authority would surely have been limited to the excision of classified material. In this case, then, it would have been obliged to clear the book for publication in precisely the same form as it now stands.[11] Thus, Snepp has not gained any profits as a result of his breach; the Government, rather than Snepp, will be unjustly enriched if he is required to disgorge profits attributable entirely to his own legitimate activity.

Despite the fact that Snepp has not caused the Government the type of harm that would ordinarily be remedied by

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viously considered the enforceability of this kind of prior restraint or the remedy that should be imposed in the event of a breach.

[11] If he had submitted the book to the Agency and the Agency had refused to consent to the publication of certain material in it, Snepp could have obtained judicial review to determine whether the Agency was correct in considering the material classified. See *United States* v. *Marchetti*, 466 F. 2d 1309, 1317 (CA4 1972), cert. denied, 409 U. S. 1063. It is noteworthy that the Court does not disagree with the Fourth Circuit's view in *Marchetti*, reiterated in *Snepp*, that a CIA employee has a First Amendment right to publish unclassified information. Thus, despite its reference in footnote 3 of its opinion to the Government's so-called compelling interest in protecting "the appearance of confidentiality," *ante*, at 509, n. 3, and despite some ambiguity in the Court's reference to "detrimental" and "harmful" as opposed to "classified" information, *ante*, at 511–512, I do not understand the Court to imply that the Government could obtain an injunction against the publication of unclassified information.

the imposition of a constructive trust, the Court attempts to justify a constructive trust remedy on the ground that the Government has suffered *some* harm. The Court states that publication of "unreviewed material" by a former CIA agent "can be detrimental to vital national interests even if the published information is unclassified." *Ante*, at 511–512. It then seems to suggest that the injury in such cases stems from the Agency's inability to catch "harmful" but unclassified information before it is published. I do not believe, however, that the Agency has any authority to censor its employees' publication of unclassified information on the basis of its opinion that publication may be "detrimental to vital national interests" or otherwise "identified as harmful." *Ibid.* The CIA never attempted to assert such power over Snepp in either of the contracts he signed; rather, the Agency itself limited its censorship power to preventing the disclosure of "classified" information. Moreover, even if such a wide-ranging prior restraint would be good national security policy, I would have great difficulty reconciling it with the demands of the First Amendment.

The Court also relies to some extent on the Government's theory at trial that Snepp caused it harm by flouting his prepublication review obligation and thus making it appear that the CIA was powerless to prevent its agents from publishing any information they chose to publish, whether classified or not. The Government theorized that this appearance of weakness would discourage foreign governments from cooperating with the CIA because of a fear that their secrets might also be compromised. In support of its position that Snepp's book had in fact had such an impact, the Government introduced testimony by the Director of the CIA, Admiral Stansfield Turner, stating that Snepp's book and others like it had jeopardized the CIA's relationship with foreign intelligence services by making them unsure of the Agency's ability to maintain confidentiality. Admiral Turner's truncated testimony does not explain, however, whether these unidentified

"other" books actually contained classified information.[12] If so, it is difficult to believe that the publication of a book like Snepp's, which does not reveal classified information, has significantly weakened the Agency's position. Nor does it explain whether the unidentified foreign agencies who have stopped cooperating with the CIA have done so because of a legitimate fear that secrets will be revealed or because they merely disagree with our Government's classification policies.[13]

In any event, to the extent that the Government seeks to punish Snepp for the generalized harm he has caused by failing to submit to prepublication review and to deter others from following in his footsteps, punitive damages is, as the Court of Appeals held, clearly the preferable remedy "since a constructive trust depends on the concept of unjust enrichment rather than deterrence and punishment. *See* D. Dobbs, Law of Remedies § 3.9 at 205 and § 4.3 at 246 (1973)." 595 F. 2d, at 937.[14]

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[12] The District Judge sustained the Government's objections to questions concerning the identity of other agents who had published the unauthorized works to which Admiral Turner referred. Tr. 136. However, Admiral Turner did testify that the harmful materials involved "[p]rimarily the appearance in the United States media of identification of sources and methods of collecting intelligence. . . ." *Id.*, at 143. This type of information is certainly classified and is specifically the type of information that Snepp has maintained he did *not* reveal in Decent Interval. See, *e. g.*, Snepp's December 7, 1977, interview on the Tomorrow show, in which he stated: "I have made a very determined effort not to expose sources or methods. . . ." Government's Requests for Admissions, Record Item 19, Exhibit I, p. 5.

[13] Snepp's attorneys were foreclosed from asking Admiral Turner whether particular foreign sources had stopped cooperating with United States' authorities as a direct result of the publication of Decent Interval. Tr. 138. Thus, it is unclear whether or why foreign sources may have reacted unfavorably to its publication. However, William E. Colby, the CIA's former Director, did indicate in his testimony that foreign nations generally have a stricter secrecy code than does the United States. *Id.*, at 175–176.

[14] One of the Court's justifications for its constructive trust remedy is that "it cannot saddle the former agent with exemplary damages out of all

II

The Court's decision to dispose of this case summarily on the Government's conditional cross-petition for certiorari is just as unprecedented as its disposition of the merits.

Snepp filed a petition for certiorari challenging the Fourth Circuit's decision insofar as it affirmed the entry of an injunction requiring him to submit all future manuscripts for prepublication review and remanded for a determination of whether punitive damages would be appropriate for his failure to submit Decent Interval to the Agency prior to its publication. The Government filed a brief in opposition as well as a cross-petition for certiorari; the Government specifically stated, however, that it was cross petitioning only to bring the entire case before the Court in the event that the Court should decide to grant Snepp's petition. The Government explained that "[b]ecause the contract remedy provided by the court of appeals appears to be sufficient in this case to protect the Agency's interest, the government has not independently sought review in this Court." In its concluding paragraph the Government stated: "If this Court grants [Snepp's] . . . petition for a writ of certiorari in No. 78–1871, it should also grant this cross-petition. If the petition in No. 78–1871 is denied, this petition should also be denied." Pet. for Cert. in No. 79–265, p. 5.

Given the Government's position, it would be highly inappropriate, and perhaps even beyond this Court's jurisdiction, to grant the Government's petition while denying Snepp's. Yet that is in essence what has been done.[15] The majority obviously does not believe that Snepp's claims merit this Court's consideration, for they are summarily dismissed in a

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proportion to his gain." *Ante*, at 516. This solicitude for Snepp's welfare is rather ironic in view of the Draconian nature of the remedy imposed by the Court today.

[15] I have been unable to discover any previous case in which the Court has acted as it does today, reaching the merits of a conditional cross-petition despite its belief that the petition does not merit granting certiorari.

footnote. *Ante,* at 509, n. 3. It is clear that Snepp's petition would not have been granted on its own merits.

The Court's opinion is a good demonstration of why this Court should not reach out to decide a question not necessarily presented to it, as it has done in this case. Despite the fact that the Government has specifically stated that the punitive damages remedy is "sufficient" to protect its interests, the Court forges ahead and summarily rejects that remedy on the grounds that (a) it is too speculative and thus would not provide the Government with a "reliable deterrent against similar breaches of security," *ante,* at 514, and (b) it might require the Government to reveal confidential information in court, the Government might forgo damages rather than make such disclosures, and the Government might thus be left with "no remedy at all," *ante,* at 515. It seems to me that the Court is foreclosed from relying upon either ground by the Government's acquiescence in the punitive damages remedy. Moreover, the second rationale [16] is entirely speculative and, in this case at least, almost certainly wrong. The Court states that

> "[p]roof of the tortious conduct necessary to sustain an award of punitive damages might force the Government to disclose some of the very confidences that Snepp promised to protect." *Ante,* at 514.

Yet under the Court of Appeals' opinion the Government would be entitled to punitive damages simply by proving that Snepp deceived it into believing that he was going to comply with his duty to submit the manuscript for prepublication review and that the Government relied on these misrepresentations to its detriment. I fail to see how such a showing would require the Government to reveal any confidential information or to expose itself to "probing discovery into the Agency's highly confidential affairs." *Ante,* at 515.

[16] Which, it should be noted, does not appear anywhere in the Government's 5-page cross-petition.

III

The uninhibited character of today's exercise in lawmaking is highlighted by the Court's disregard of two venerable principles that favor a more conservative approach to this case.

First, for centuries the English-speaking judiciary refused to grant equitable relief unless the plaintiff could show that his remedy at law was inadequate. Without waiting for an opportunity to appraise the adequacy of the punitive damages remedy in this case, the Court has jumped to the conclusion that equitable relief is necessary.

Second, and of greater importance, the Court seems unaware of the fact that its drastic new remedy has been fashioned to enforce a species of prior restraint on a citizen's right to criticize his government.[17] Inherent in this prior restraint is the risk that the reviewing agency will misuse its authority to delay the publication of a critical work or to persuade an author to modify the contents of his work beyond the demands of secrecy. The character of the covenant as a prior restraint on free speech surely imposes an especially heavy burden on the censor to justify the remedy it seeks. It would take more than the Court has written to persuade me that that burden has been met.

I respectfully dissent.

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[17] The mere fact that the Agency has the authority to review the text of a critical book in search of classified information before it is published is bound to have an inhibiting effect on the author's writing. Moreover, the right to delay publication until the review is completed is itself a form of prior restraint that would not be tolerated in other contexts. See, *e. g.*, *New York Times Co.* v. *United States*, 403 U. S. 713; *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539. In view of the national interest in maintaining an effective intelligence service, I am not prepared to say that the restraint is necessarily intolerable in this context. I am, however, prepared to say that, certiorari having been granted, the issue surely should not be resolved in the absence of full briefing and argument.

Syllabus

STAFFORD, U. S. ATTORNEY, ET AL. *v.* BRIGGS ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 77–1546. Argued April 24, 1979—Reargued November 7, 1979—Decided February 20, 1980*

In No. 77–1546, respondents, who had been among those subpoenaed to appear before a federal grand jury in Florida investigating a possible conspiracy to cause a riot, brought suit in the United States District Court for the District of Columbia against petitioners (the then United States Attorney and Assistant United States Attorney for the Northern District of Florida, and a Federal Bureau of Investigation agent) and a Department of Justice attorney, individually and in their official capacities, alleging a conspiracy to deprive respondents of various statutory and constitutional rights, and seeking damages and a declaratory judgment. Petitioners, each of whom resided in Florida, were served by certified mail, and the Department of Justice attorney, who resided in the District of Columbia, was served personally. Respondents relied on § 2 of the Mandamus and Venue Act of 1962 (Act), 28 U. S. C. § 1391 (e), which provides in part that "[a] civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose . . . , or (4) the plaintiff resides if no real property is involved in the action," and that delivery of the summons and complaint to the officer in such an action may be made by certified mail beyond the territorial limits of the district in which the action is brought. The District Court dismissed the action, ruling that venue was improper and that the court lacked *in personam* jurisdiction over petitioners. The Court of Appeals reversed, holding that § 2 permits damages actions against federal officials to be brought in any district in which any one defendant resides, and that since the Department of Justice attorney was a resident of the District of Columbia venue there was proper. In No. 78–303, respondents, whose mail between the United States and the Soviet Union had allegedly been opened by the Central Intelligence

*Together with No. 78–303, *Colby, Director, Central Intelligence Agency, et al.* v. *Driver et al.*, on certiorari to the United States Court of Appeals for the First Circuit.

Agency, brought suit in the United States District Court for the District of Rhode Island against petitioners (the then Director and Deputy Director of the CIA) and others, in their individual and official capacities, alleging that interference with respondents' mail violated their constitutional rights, and seeking damages, as well as declaratory and injunctive relief. Petitioners and the other defendants were served outside of Rhode Island by certified mail. The District Court denied the defendants' motion to dismiss the complaint for lack of personal jurisdiction, improper venue, and insufficiency of process, but certified the questions involved for an immediate appeal. The Court of Appeals affirmed the District Court's order as to petitioners, who were CIA officials when the complaint was filed, but reversed as to those defendants who had left their Government positions at the time of filing, holding that § 2 applied to damages actions against federal officials in their individual capacities and provided the mechanism for obtaining personal jurisdiction over them, and that accordingly venue was proper in Rhode Island because one of the respondents resided there.

Held: Section 2 of the Act does not apply to actions for money damages brought against federal officials in their individual capacities. Pp. 533–545.

(a) Section 2's language "is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority" can reasonably be read as describing the character of the defendant at the time of suit, and, so read, limits a covered "civil action" to one against a federal official who is at that time acting, or failing to act, in an official or apparently official way. Such a "civil action" is that referred to in § 1 of the Act, 28 U. S. C. § 1361, which gives district courts jurisdiction of "any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Pp. 535–536.

(b) The Act's legislative history clearly indicates that Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions that are nominally against an individual officer but are in reality against the Government. A suit for money damages which must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Government plainly is not one "essentially against the United States," and thus is not encompassed by the venue provisions of § 2. Pp. 536–543.

(c) If § 2 were construed to govern damages actions against federal officers individually, suits could be brought against those officers while in Government service—and could be pressed even after the officer has

left service—in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction. This would place federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b) damages suits against private persons must be brought in the district where all the defendants reside or in which the claim arose. Such was not the intent of Congress. Pp. 544–545.

No. 77–1546, 186 U. S. App. D. C. 170, 569 F. 2d 1; and No. 78–303, 577 F. 2d 147, reversed and remanded.

BURGER, C. J., delivered the opinion of the Court, in which BLACKMUN, POWELL, REHNQUIST, and STEVENS, JJ., joined. STEWART, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 545. WHITE, J., took no part in the consideration or decision of the cases. MARSHALL, J., took no part in the decision of the cases.

Peter Megargee Brown reargued the cause for petitioners in No. 77–1546. With him on the briefs was *Earl H. Nemser*. Mr. Nemser reargued the cause for petitioners in No. 78–303. With him on the briefs was Mr. Brown.

Doris Peterson reargued the cause for respondents in No. 77–1546. With her on the briefs were *Morton Stavis, Nancy Stearns, Robert L. Boehm, Cameron Cunningham, Brady Coleman, Jack Levine,* and *Philip Hirschkop. Melvin L. Wulf* reargued the cause for respondents in No. 78–303. With him on the brief were *Leon Friedman* and *Burt Neuborne.*

Elinor H. Stillman reargued the cause for the United States as *amicus curiae* urging reversal in No. 78–303. On the brief urging reversal in both cases were *Solicitor General McCree, Assistant Attorney General Babcock, Deputy Solicitor General Easterbrook, Allan A. Ryan, Jr.,* and *Robert E. Kopp.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in these cases to decide whether the venue provisions contained in § 2 of the Mandamus and Venue Act of 1962, 28 U. S. C. § 1391 (e), apply to actions

for money damages brought against federal officials in their individual capacities. 439 U. S. 1113 (1979).

I

No. 77–1546

Stafford et al. v. *Briggs et al.*

In 1972, petitioner William Stafford was United States Attorney and petitioner Stuart Carrouth was an Assistant United States Attorney for the Northern District of Florida. Guy Goodwin was an attorney in the Department of Justice.[1] Together they conducted grand jury proceedings in Florida, inquiring into the possibility that various individuals had conspired and engaged in interstate travel with intent to cause a riot. Respondents were among those subpoenaed to appear. At the request of respondents' counsel, the District Judge responsible for the proceedings called Goodwin to the stand and asked him to state, under oath, whether any of the witnesses represented by respondents' counsel was an agent or informant of the Government. Goodwin replied that none was.

Respondents later brought this suit in the United States District Court for the District of Columbia against Goodwin, Stafford, Carrouth, and petitioner Claude Meadow, an agent for the Federal Bureau of Investigation. Each was sued individually and in his official capacity. Respondents alleged that Goodwin had testified falsely in furtherance of a conspiracy among petitioners and Goodwin to deprive respondents of various statutory and constitutional rights. Each respondent sought a declaratory judgment, $50,000 in compensatory damages, and $100,000 in punitive damages. Petitioners, each of whom resided in Florida, were served by certified mail; Goodwin, whose residence was in the District of Columbia, was served personally.

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[1] Goodwin is not a party in the case before this Court.

Respondents relied on § 2 of the Mandamus and Venue Act of 1962, which, as amended and codified in Title 28 of the United States Code, provides:

"§ 1391. Venue generally

. . . . .

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Petitioners requested transfer of the action to the Northern District of Florida, or, alternatively, dismissal for improper venue and insufficiency of process. The District Court denied the motion to transfer but granted the motion to dismiss, ruling that venue was improper and that the court lacked *in personam* jurisdiction over the petitioners.[2]

[2] Goodwin joined petitioners in making the transfer request. He also moved for dismissal on grounds of prosecutorial immunity. This motion was denied. See *Briggs* v. *Goodwin*, 384 F. Supp. 1228 (DC 1974),

Respondents appealed the District Court's order dismissing the case against petitioners, and the Court of Appeals for the District of Columbia Circuit reversed, holding that 28 U. S. C. § 1391 (e) permits damages actions against federal officials to be brought in any district in which any one defendant resides. *Briggs* v. *Goodwin*, 186 U. S. App. D. C. 170, 569 F. 2d 1 (1977). Because Goodwin was a resident of the District of Columbia, venue there was proper. The court also held that there was no constitutional infirmity in the statute as applied. It refused to apply the "minimum contacts" analysis of *International Shoe Co.* v. *Washington*, 326 U. S. 310 (1945), and held that in a case such as this there is no constitutional requirement that defendants have any contacts with the place in which a particular federal court sits before they may be sued in that court.

No. 78–303

Colby et al. v. *Driver et al.*

From 1953 to 1973 at the International Airport in New York, the Central Intelligence Agency opened and made photographic copies of certain mail traveling between the United States and the Soviet Union.[3]

Petitioner Vernon Walters was appointed Deputy Director of Central Intelligence in 1972; petitioner William Colby was appointed Director of Central Intelligence in 1973. Both petitioners were in office in 1975 when respondents, acting on behalf of themselves and others whose mail had allegedly been opened by the CIA, brought suit in the United States District Court for the District of Rhode Island. Respondents alleged that the interference with their mail to and from the

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aff'd, 186 U. S. App. D. C. 179, 569 F. 2d 10 (1977), cert. denied, 437 U. S. 904 (1978).

[3] See Senate Select Committee to Study Governmental Operations with respect to Intelligence Activities, Final Report, S. Rep. No. 94–755, Book 3, pp. 559–677 (1976).

Soviet Union violated their constitutional rights. Their suit, brought against both present and former federal officials in their individual and official capacities, requested declaratory, injunctive, and monetary relief, including $20,000 for each letter opened and punitive damages of $100,000 for each member of the plaintiff class.

Petitioners and the other defendants were served outside of Rhode Island by certified mail. All the defendants moved to dismiss the complaint for lack of personal jurisdiction, improper venue, and insufficiency of process, claiming that no defendant resided in or had substantial contacts with Rhode Island and that the complaint failed to allege that any activity had occurred there. The District Court denied these motions but certified the questions involved for an immediate appeal.

The Court of Appeals for the First Circuit affirmed the order of the District Court as to petitioners, who were CIA officials when the complaint was filed, but it reversed as to those defendants who had left their Government positions at the time of filing. *Driver* v. *Helms*, 577 F. 2d 147 (1978).[4] The court held that § 1391 (e) applied to damages actions against federal officials in their individual capacities and provided the mechanism for obtaining personal jurisdiction over them. Venue was proper in Rhode Island because one of the respondents resided there. The court also rejected petitioners' challenge to the constitutionality of the statute, ruling that minimum contacts analysis was not relevant in this situation.

II

Soon after the passage of the Judiciary Act of 1789, 1 Stat. 73, this Court held that Congress had not granted the federal

[4] The court concluded that because 28 U. S. C. § 1391 (e) was drafted in the present tense, Congress did not mean it to apply to former officials. Although respondents sought certiorari on this question, we declined review. 439 U. S. 1114 (1979).

trial courts generally the power to issue writs of mandamus. *McIntire* v. *Wood*, 7 Cranch 504 (1813). The federal courts in the District of Columbia, which derived power to issue the writ from the common law of the State of Maryland, were the sole exception. *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524 (1838).

To avoid this jurisdictional obstacle, litigants seeking mandamus-type relief outside of the District of Columbia often brought suits for injunctive or declaratory relief instead. But in most cases a superior federal officer was an indispensable party. See, *e. g.*, *Williams* v. *Fanning*, 332 U. S. 490 (1947). Because of the legal fiction that officers of such rank resided only where they were stationed—usually the District of Columbia—effective service could be obtained only there. And with the restrictive venue provisions then in effect, joinder of such an official required that the action be brought in the District of Columbia. See 28 U. S. C. § 1391 (b) (1946 ed., Supp. II), amended in Pub. L. 89–714, 80 Stat. 1111 (1966). The net result was that persons in distant parts of the country claiming injury by reason of the acts or omissions of a federal officer or agency were faced with significant expense and inconvenience in bringing suits for enforcement of claimed rights.

In response to this problem, Congress enacted the Mandamus and Venue Act of 1962. Section 1 of the Act, 28 U. S. C. § 1361, provides that actions in the nature of mandamus can be brought in any district court of the United States.[5] Section 2 of the Act, 28 U. S. C. § 1391 (e), provides a similarly expanded choice of venue and authorizes service by certified mail on federal officers or agencies located outside the district in which such a suit is filed.

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[5] "§ 1361. Action to compel an officer of the United States to perform his duty

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

The 1962 legislation thus makes it more convenient for aggrieved persons to file actions in the nature of mandamus. Respondents argue, however, that much more was intended. They contend that by using the general language "civil action," Congress intended to include in the expanded venue provision not only mandamus-type actions but all civil actions, including those seeking money damages from federal officers as individuals.

The language of § 1391 (e) does refer to "a civil action." Recitation of that fact, however, but begins our inquiry, as this Court noted over a century ago when faced with a similar problem of statutory interpretation:

> "The general words used in the clause . . . taken by themselves, and literally construed, without regard to the object in view, would seem to sanction the claim of the plaintiff. But this mode of expounding a statute has never been adopted by any enlightened tribunal—because it is evident that in many cases it would defeat the object which the Legislature intended to accomplish. And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . ." *Brown* v. *Duchesne,* 19 How. 183, 194 (1857).

Looking first to "the whole statute," two things are apparent: (1) § 1 of the Mandamus and Venue Act of 1962 is explicitly limited to "action[s] in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U. S. C. § 1361. (2) The "civil action" referred to in § 2 of the Act is one "in which a defendant *is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority. . . .*" 28 U. S. C. § 1391 (e) (emphasis added). The highlighted lan-

guage, cast by Congress in the present tense, can reasonably be read as describing the character of the defendant at the time of the suit. So read, it limits a covered "civil action" to one against a federal official or agency who is at that time acting—or failing to act—in an official or apparently official way.[6] Such "civil actions" are those referred to in § 1 of the Act, *i. e.*, "action[s] in the nature of mandamus."

Our analysis does not stop with the language of the statute; we must also look to "the objects and policy of the law." *Brown* v. *Duchesne*, 19 How., at 194. In order to "give [the Act] such a construction as will carry into execution the will of the Legislature . . . according to its true intent and meaning," *ibid.*, we turn to the legislative history. *Schlanger* v. *Seamans*, 401 U. S. 487, 490, n. 4 (1971). See also *United States* v. *Culbert*, 435 U. S. 371, 374, n. 4 (1978); *Train* v. *Colorado Public Interest Research Group*, 426 U. S. 1, 9–10 (1976).

III

H. R. 10089, 86th Cong., 2d Sess. (1960), was a precursor of the bill which eventually became the 1962 Act. Congressman Budge, the author of H. R. 10089, explained its purpose:

> "As it is now, there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there [in the field], no matter how arbitrary or capricious, because it is too expensive to come back here [to Washington, D. C.] to litigate it." Hearings on H. R. 10089 before Subcommittee No. 4 of the House Committee on the Judiciary, 86th Cong., 2d Sess., 19–20 (May 26 and June 2, 1960).[7]

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[6] Congress' use of the language "under color of legal authority" is explained in the House Committee Report as an effort to circumvent the sovereign immunity doctrine. See *infra*, at 538–539.

[7] A certified copy of these unpublished hearings has been lodged with the Clerk of this Court.

As often happens, the dialogue between witnesses, Members, and Committee Counsel reveals considerable initial confusion as to the extent of the problem and the proposed solution. Of course, the very purpose of hearing witnesses is to expose problems, probe for solutions, and reach a consensus. At one point Congressman Poff, in an obvious effort to clarify the responses, asked the Department of Justice witness, Donald MacGuineas:

> "Mr. POFF. Wouldn't you say the author's objective is to give a citizen who has a legitimate complaint against his Government the right to sue his Government at the place where the wrong was committed?
>
> "Mr. MACGUINEAS. The difficulty, if I may say so, Congressman, with your statement, is you speak of the right to sue his Government. Now, that proposition in itself raises very difficult and complicated legal questions which I touched upon at my appearance last week.
>
> "You must first decide whether a particular suit is actually a suit against the man in his official capacity or whether it i[s] a suit against the Government officer in his individual capacity. If it is the latter, it is not in any sense a suit against the Government." *Id.*, at 54.

Committee Counsel later asked the Department of Justice witness:

> "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity or under color of legal authority'?" *Id.*, at 61.

Mr. MacGuineas' response, which must now be recognized as prophetic, was that such language might later be misinterpreted as covering a damages action against a person holding Government office. This, he said, would raise "serious policy questions" by allowing a Government official to be sued in the

plaintiff's home district while a private defendant in the same kind of action could be sued only in the district of his residence. The Chairman, Mr. Forrester, and the ranking senior Committee Member, Mr. Poff, both stated that they shared the same concern. *Id.*, at 62–63.

Judge Albert Maris, then Chairman of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, testified that such an "injustice" to the Government officer could be avoided only by requiring a damages suit to be brought in the district of his residence or where the cause of action arose. "That," said Judge Maris, "is the normal procedure in the law. That is what ordinarily happens in the ordinary law suit." *Id.*, at 86. Congressman Dowdy, one of the four Members present, then said:

> "Speaking to the point you were talking about, I don't understand that we have in consideration suits for money damages. That would be maybe where a person is being sued as an individual." *Id.*, at 87.

When Judge Maris stated his view that cases involving money damages would not be involved, Mr. Dowdy agreed: "They would not be covered by this [proposed legislation]." *Ibid.*

Finally, near the conclusion of the hearing, the bill's author, Mr. Budge, stated:

> "We always get off into these slander type actions which is not what I am seeking at all. When Mr. MacGuineas stated here this morning that he was not sure of the purpose of the legislation, I think that is perhaps true, because *I have no intention of bringing* [within this bill] *tort actions against individual government employees.* All I am seeking to do is to have the review of their official actions take place in the United States District Court where the determination was made." *Id.*, at 102 (emphasis added).

Following the hearings, the Subcommittee redrafted H. R. 10089. The revised version, H. R. 12622, 86th Cong., 2d

Sess. (1960), among other things, added the language "or under color of legal authority" to the phrase "acting in his official capacity." Far from being intended as the master key which would unlock the door to nationwide venue for money damages actions brought against an official as an individual, this language was specifically intended only to alleviate the hardships caused by a relatively narrow but nagging problem, as the Committee Report made clear:

> "By including the officer or employee, both in his official capacity and acting under color of legal authority, the committee intends to make the proposed section 1391 (e) applicable not only to those cases where an action may be brought against an officer or employee in his official capacity. It intends to include also those cases where the action is nominally brought against the officer in his individual capacity even though he was acting within the apparent scope of his authority and not as a private citizen. *Such actions are also in essence against the United States but are brought against the officer or employee as an individual only to circumvent what remains of the doctrine of sovereign immunity.* The considerations of policy which demand that an action against an official may be brought locally rather than in the District of Columbia require similar venue provisions where the action is based upon the fiction that the officer is acting as an individual. There is no intention, however, to alter the venue requirements of Federal law insofar as suits resulting from the official's private actions are concerned." H. R. Rep. No. 1936, 86th Cong., 2d Sess., 3–4 (1960) (emphasis added).

The Committee's statement of the legislation's purpose also sheds considerable light on the congressional intent:

> "The purpose of this bill is to make it possible to bring actions against Government officials and agencies in U. S. district courts outside the District of Columbia, *which,*

because of certain existing limitations on jurisdiction and venue, may now be brought only in the U. S. District Court for the District of Columbia." Id., at 1 (emphasis added).

In context, this clearly confines the intended thrust of § 1391 (e) to mandamus-type actions. See *supra*, at 533–534. The Report continues:

> "Section 2 [§ 1391 (e)] is the venue section of the bill. Its purpose is similar to that of section 1. It is designed to permit an action *which is essentially against the United States* to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." H. R. Rep. No. 1936, *supra*, at 2 (emphasis added).[8]

Although H. R. 12622 passed the House in 1960, the Senate adjourned without acting on it. See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1 (1961). The same bill was reintroduced in the next Congress as H. R. 1960, 87th Cong., 1st Sess. (1961). The Committee Report was republished as H. R. Rep. No. 536, 87th Cong., 1st Sess. (1961), and the bill was referred to the Senate.

The Senate Judiciary Committee also solicited comments on the bill from the Department of Justice. The Department suggested, *inter alia*, that it would be prudent to effect the

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[8] Respondents' argument that § 1391 (e) should apply to personal damages actions is based on an isolated passage in the Committee Report:

"The venue problem also arises in an action against a Government official seeking damages from him for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." H. R. Rep. No. 1936, at 3.

In the face of the consistently expressed intent of the Committee to include only actions essentially against the Government, we decline to treat this one cryptic sentence as dispositive of the legislative intent. See *Blackburn* v. *Goodwin*, 608 F. 2d 919 (CA2 1979).

venue reform by amending the Administrative Procedure Act so that "suits for money judgments against officers" would be "unquestionably eliminate[d]." See Letter from Deputy Attorney General White to Senator Eastland (Feb. 28, 1962), reprinted in S. Rep. No. 1992, 87th Cong., 2d Sess., 6 (1962). Although the Senate Committee in its Report commented on other suggestions proffered by the Justice Department, in this instance it made no response at all.[9] Respondents and the Courts of Appeals rely on this failure to respond as indicating an intention that the venue provisions were to apply to actions for money damages brought against a federal official in his individual capacity.

We are not persuaded by this negative inference. Several passages affirmatively state the limited nature of the bill: The Senate Committee's statement of the bill's purpose is exactly the same as that found in the House Report. Compare S. Rep. No. 1992, *supra*, at 2, with H. R. Rep. No. 536, *supra*, at 1. The Committee also states that "[t]he bill, as amended, is intended to facilitate review by the Federal courts of *administrative* actions," S. Rep. No. 1992, *supra*, at 2 (emphasis added), which does not afford a basis for reading the language of the statute to include money damages actions against individuals. And the following comment as to the bill's venue provisions appears in the Report:

> "The committee is of the view that the current state of the law respecting venue in actions against Government officials is contrary to the sound and equitable administration of justice. Frequently, the administrative determinations involved are made not in Washington

[9] The only arguable reference is a passage taken verbatim from the House Report which mentions that the venue problem also arises in suits against officials for damages for acts taken in the course of performing official duties. See S. Rep. No. 1992, at 3. Inasmuch as this passage, like much of the Senate Report, is but a recitation of language used earlier in the House Report, see n. 8, *supra*, it obviously was not drafted in response to the Justice Department's letter.

but in the field. In either event, these are actions *which are in essence against the United States.* The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U. S. attorneys are present in every judicial district. Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition." S. Rep. No. 1992, *supra,* at 3 (emphasis added).

Here again is confirmation that there was no thought to expand the venue provisions except as to actions "in essence against the United States," since the Government is not "required" to defend personal actions in which a Government employee is a defendant.

What emerges is that the bill's author, the Committees, and the Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government. A suit for money damages which must be paid out of the pocket of the private individual who happens to be—or formerly was—employed by the Federal Government plainly is not one "essentially against the United States," and thus is not encompassed by the venue provisions of § 1391 (e).[10]

This is not the first time an overbroad interpretation of § 1391 (e) has been rejected by this Court. In *Schlanger* v. *Seamans,* 401 U. S. 487 (1971), the question was whether in a habeas corpus proceeding "any custodian, or one in the chain of command, as well as the person detained, must be

[10] In deciding whether an action is in reality one against the Government, the identity of the named parties defendant is not controlling; the dispositive inquiry is "who will pay the judgment?" See *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U. S. 682 (1949). Here, it is against individuals and not against the Government that a money judgment is sought.

in the territorial jurisdiction of the District Court." *Id.*, at 489. While recognizing that habeas corpus is "a civil action," we noted that reference to § 1391 (e) did not provide the answer. In the opinion for the Court, Mr. Justice Douglas stated:

> "Although by 28 U. S. C. § 1391 (e) . . . Congress has provided for nationwide service of process in a 'civil action in which each defendant is an officer or employee of the United States,' the legislative history of that section is barren of any indication that Congress extended habeas corpus jurisdiction. *That section was enacted to broaden the venue of civil actions which could previously have been brought only in the District of Columbia.* See H. R. Rep. No. 536, 87th Cong., 1st Sess., 1; S. Rep. No. 1992, 87th Cong., 2d Sess., 2." 401 U. S., at 490, n. 4. (Emphasis added.)

As we have noted, the "civil actions which could previously have been brought only in the District of Columbia" were suits for mandamus, not actions for money damages. See *supra*, at 533–534. The clear purport of our statement in *Schlanger* is that Congress did not intend the phrase "civil action" to be given the sweeping definition argued for it in that case, and that the Court was required to turn to the legislative history to determine which "civil actions" § 1391 (e) governed.

IV

The conclusion derived from the legislative history that § 1391 (e) does not cover the type of suits here at issue is buttressed by consideration of the consequences of the broad interpretation urged upon us by respondents. The conditions and venue provisions under which officers of the United States may be sued, while in office or after leaving office, have serious implications for defendants as well as for those seeking relief. An officer of the Government while so employed may have numerous mandamus-type suits naming him or her as a party.

Without doubt, under § 1391 (e), venue lies in every one of the 95 federal districts, and suits may be pending in a dozen or several dozen at any one time. Even though the burden of defending multiple suits while in office may be onerous, the United States Attorney in each of the districts and the Department of Justice carry that burden. In a mandamus suit only rarely would the officer himself be obliged to travel to the district in which the case was heard; if so obliged, the travel would be at Government expense. When an official leaves office, his personal involvement in a mandamus suit effectively ends and his successor carries on. No personal cost or inconvenience is incurred, either while in office or later. It was with this understanding that Congress sought to ameliorate the inconvenience and expense to private plaintiffs seeking relief from the action or inaction of their Government. H. R. Rep. No. 536, at 3; S. Rep. No. 1992, at 3.

Suits for money damages for which an individual officeholder may be found personally liable are quite different. If § 1391 (e) were construed to govern actions for money damages against federal officers individually, suits could be brought against these federal officers while in Government service—and could be pressed even after the official has left federal service—in any one of the 95 federal districts covering the 50 states and other areas within federal jurisdiction. This would place federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b), suits against private persons for money damages must be brought "in the judicial district where all defendants reside, or in which the claim arose." [11]

[11] Under this provision the case against petitioner Stafford could have been brought only in the Northern District of Florida where the alleged claim arose. As to petitioner Colby, the proper venue would have been the Eastern District of New York where the alleged claim arose, or perhaps the Eastern District of Virginia, where some acts may have occurred at the headquarters of the CIA.

There is, however, no indication that a Congress concerned with "the sound and equitable administration of justice," H. R. Rep. No. 536, at 3; S. Rep. No. 1992, at 3, intended to impose on those serving their Government the burden of defending personal damages actions in a variety of distant districts after leaving office. Absent a clear indication that Congress intended such a sweeping effect, we will not infer such a purpose nor will we interpret a statute to effect that result. "We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions to reach cases which Congress evidently could not have contemplated, without departing from the principle upon which they were legislating, and going far beyond the object they intended to accomplish." *Brown* v. *Duchesne,* 19 How., at 197.

The judgments of the Courts of Appeals in No. 77–1546 and No. 78–303 are reversed, and the cases are remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

MR. JUSTICE MARSHALL took no part in the decision of these cases.

MR. JUSTICE STEWART, with whom MR. JUSTICE BRENNAN joins, dissenting.

The Court today holds that in a suit against a federal officer for allegedly wrongful actions under color of legal authority, the venue provisions of § 2 of the Mandamus and Venue Act of 1962, 28 U. S. C. § 1391 (e), are applicable only if the officer is simply a nominal defendant, and the plaintiff's real grievance is against the Government. I disagree. It is my view that § 1391 (e) means what it says, and that it thus

applies as well to a suit for damages against a federal officer for his own wrongdoing.

I

When Congress enacted § 1391 (e) in 1962, this Court had recognized two types of suits against federal officers acting under color of legal authority.[1] See *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682. The first of these two types of suits was based on a legal fiction designed to circumvent the doctrine of sovereign immunity. This fiction enabled an aggrieved party to obtain equitable relief in a case nominally directed against a federal officer if the officer had acted either unconstitutionally or in excess of his statutory authority. The theory underlying the fiction was that the relief sought was against the officer in his individual capacity, rather than against the Government. *Id.*, at 689–690. But, since any sovereign can act only through its agents, the reality was that the relief sought was in fact against the Government itself. The second type of suit, by contrast, was a direct action against the federal officer in his individual capacity for actions taken under color of legal authority. *Id.*, at 687. Such a suit typically sought to assess personal monetary liability against the officer.

The issue here is whether the venue and service of process provisions of § 1391 (e) were intended to apply to both of these kinds of suits. Section 1391 (e) provides in relevant part:

> "A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . , may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or

[1] For purposes of brevity, I hereafter refer to "suits against federal officers acting under color of legal authority" simply as "suits against federal officers."

(3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. . . .

"The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer . . . as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought."

Since either of the two types of suits described above is properly characterized as "[a] civil action in which a defendant is an officer or employee of the United States . . . acting . . . under color of legal authority," it is quite clear that they both fall within the plain meaning of § 1391 (e).[2] Thus, by its own terms, § 1391 (e) unambiguously extends to the second type of suit against a federal officer, that is, one in which, as here, money damages are sought directly from the federal officer himself.

II

Relying on legislative history and policy considerations, the Court turns its back on the words of the statute and holds that it does not cover a suit against a federal officer for money damages. The legislative history, according to the Court, indicates that the general purpose of Congress in enacting the Mandamus and Venue Act of 1962 (Act) was to remove then

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[2] The Court argues that since § 1391 (e) is written in the present tense ("[a] civil action in which a defendant *is* an officer or employee of the United States . . . *acting* in his official capacity or under color of legal authority" (emphasis added)), the phrase "acting . . . under color of legal authority" is properly construed as applying only to a nominal suit against a federal officer for equitable relief. Such a suit, the Court notes, is necessarily brought against a defendant who is presently serving as a federal officer. *Ante*, at 535–536. This argument falls short of the mark, however, for many suits against federal officers for money damages, such as those at issue here, are brought against the officers while they are still in Government service.

existing jurisdictional and venue obstacles to suits against federal officers for mandamus-type relief outside the District of Columbia. The legislative history further indicates, in the Court's view, that the specific, and *exclusive*, concern of Congress in adding to § 1391 (e) the phrase at issue here, "acting . . . under color of legal authority," was to ensure that the provision would govern suits against federal officers for equitable relief. Thus the Court concludes that the proper construction of the phrase "acting . . . under color of legal authority" is coextensive with the sole concern to which it was purportedly addressed. This construction is said to find further support in the policies underlying the Act.[3]

The Court thus purports to rely on the familiar rule that " 'in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law.' " *Ante*, at 535, quoting *Brown* v. *Duchesne*, 19 How. 183, 194. See *Steelworkers* v. *Weber*, 443 U. S. 193, 201–202. This reliance is misplaced, however, since neither the legislative history nor public policy is inconsistent with the plain meaning of § 1391 (e).

A

The forerunner of the Act was introduced as H. R. 10089, 86th Cong., 2d Sess. (1960). That bill provided:

> "A civil action in which each defendant is an officer of the United States *in his official capacity*, a person acting under him, or an agency of the United States, may be brought in any judicial district where a plaintiff in the action resides." (Emphasis added.)

[3] The Court also finds support for its construction of § 1391 (e) in our holding in *Schlanger* v. *Seamans*, 401 U. S. 487, 490, n. 4, that § 1391 (e) does not apply to habeas corpus actions. This reliance is misplaced, because the *Schlanger* decision turned on the *sui generis* nature of habeas corpus actions which, though "technically 'civil,' . . . [are] not automatically subject to all the rules governing ordinary civil actions." *Ibid.*

Following hearings and the submission of written comments on H. R. 10089 to a House Subcommittee of the Committee on the Judiciary, a new bill was introduced that parallels closely the current language of the Act. The new bill, H. R. 12622, 86th Cong., 2d Sess. (1960), contained two sections: the first vested all district courts with jurisdiction to hear suits seeking mandamus-type relief;[4] the second broadened the venue alternatives for a suit against a federal officer "acting in his official capacity *or under color of legal authority.*" (Emphasis added.) This bill passed the House in 1960, but the Senate adjourned without acting on it. The same bill was then reintroduced in the next Congress, H. R. 1960, 87th Cong., 1st Sess. (1961), and, with only minor amendments, was enacted by both the House and the Senate.

The question here is why Congress expanded the ambit of the second section of the Act, now § 1391 (e), to include not only a suit against a federal officer "acting in his official capacity," but also a suit against a federal officer "acting . . . under color of legal authority." The Court says that the legislative history reveals that the phrase "acting . . . under color of legal authority" was added to § 1391 (e) for the sole purpose of including within its coverage suits against federal officers for equitable relief. This view is said to find support in the positions announced by members of the House Subcommittee during the hearings on H. R. 10089, and in the Committee Reports that accompanied the subsequent versions of the bill.

I would have to agree that a principal purpose of adding the phrase "acting . . . under color of legal authority" to § 1391 (e) was to ensure that the venue provisions would apply to suits against federal officers for equitable relief. At the Sub-

[4] This section of the bill, with minor modifications, was later enacted as § 1 of the Act, 28 U. S. C. § 1361, which provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

committee Hearings on H. R. 10089, the proponent of the bill, Representative Budge, explained the basic problem to which it was addressed—that, in light of then existing venue and jurisdictional obstacles, "there is no opportunity for a judicial review of the action of any decision that is made by a Federal officer in charge out there [in the field], no matter how arbitrary or capricious, because it is too expensive to come back here [to Washington, D. C.] to litigate it." Hearings on H. R. 10089 before Subcommittee No. 4 of the House Committee on the Judiciary, 86th Cong., 2d Sess., 19–20 (1960).

The record of the testimony at the Subcommittee hearings, however, reveals substantial confusion both as to the scope of the problem and the manner in which it ought to be resolved. During the hearings, a representative of the Justice Department observed that since the bill, as drafted, applied only to a suit against a federal officer "in his official capacity," there would remain unresolved the venue and jurisdictional problems in the context of a suit for equitable relief brought against a federal officer in his individual capacity to sidestep the problem of sovereign immunity. *Id.*, at 32–33. In response, the Subcommittee's counsel proposed the addition of the language at issue here: "Suppose in order to take care of a body of law which seems to say that when a government official does something wrong he is acting in his individual capacity, we added the following language—'acting in his official capacity *or under color of legal authority.*'" *Id.*, at 61 (emphasis added). That phrase was then incorporated in the redrafted bill, H. R. 12622, as well as subsequent bills. The Committee Reports accompanying those bills confirm that Congress intended § 1391 (e) to govern suits against federal officers for equitable relief.

Although a principal purpose of adding the phrase "acting . . . under color of legal authority" to § 1391 (e) thus undoubtedly was to ensure that the venue provision would apply to suits against federal officers for equitable relief, it is not at all clear

from the legislative history that Congress sought *only* to include such suits within the broadened ambit of the provision. Whatever may have been the intent of the Subcommittee members who conducted the hearings on the original bill, the Committee Reports accompanying subsequent bills—all of which included the phrase "acting . . . under color of legal authority"—indicated an intent to reach suits against federal officers not only for equitable relief, but also for money damages. In describing the scope of the problem addressed by the Act, the Committee Reports indicated that "[t]he venue problem also arises in an action against a Government official *seeking damages from him* for actions which are claimed to be without legal authority but which were taken by the official in the course of performing his duty." H. R. Rep. No. 1936, 86th Cong., 2d Sess., 3 (1960); H. R. Rep. No. 536, 87th Cong., 1st Sess., 3 (1961); S. Rep. No. 1992, 87th Cong., 2d Sess., 3 (1961) (emphasis added).

It is also significant that at least one of these Committee Reports, that of the Senate Judiciary Committee, was issued after the then Deputy Attorney General had recommended that the venue reform be tied in directly to the Administrative Procedure Act. Letter from Deputy Attorney General White to Senator Eastland (Feb. 28, 1962), reprinted in S. Rep. No. 1992, *supra*, at 6. "This," he observed, "[would] unquestionably eliminat[e] suits for money judgments against officers." *Ibid.* Although the Committee acted upon other suggestions in that letter, it took no steps whatsoever to narrow the ambit of § 1391 (e) to exclude suits for money damages. Rather, as stated above, the Committee Report indicated that the venue problem to which the bill was addressed applied to such suits.

B

It is also instructive that shortly after the Act was signed into law, then Deputy Attorney General Katzenbach circulated a memorandum to all United States Attorneys to assist

them in defending suits brought under the newly enacted legislation. In that memorandum, he noted:

> "The venue provision [§ 1391 (e)] is applicable to suits against Government officials and agencies for injunctions and damages as well as suits for mandatory relief. . . . As an example, suits for damages for alleged libel or slander by Government officials (which the Department defends on the ground that statements made by a Government official within the scope of his authority are absolutely privileged . . .) fall within the venue provision of this statute."

It is thus clear that the Justice Department regarded § 1391 (e) as applicable to suits against federal officers for money damages for actions taken under color of legal authority.

The significance of this memorandum is twofold. First, it represents a contemporaneous interpretation of § 1391 (e) that is wholly at odds with that adopted by the Court. Second, it indicates that the Justice Department has long assumed a special responsibility for representing federal officers sued for money damages for actions taken under color of legal authority. This longstanding responsibility is carried forth in current regulations. See 28 CFR §§ 50.15, 50.16 (1979).

The fact that the Justice Department, in most circumstances, will provide such representation substantially undercuts the Court's policy argument that to construe § 1391 (e) to govern suits for money damages would undermine the "sound and equitable administration of justice," see H. R. Rep. No. 536, *supra*, at 3; S. Rep. No. 1992, *supra*, at 3, by "plac[ing] federal officers, solely by reason of their Government service, in a very different posture in personal damages suits from that of all other persons, since under 28 U. S. C. § 1391 (b), suits against private persons for money damages must be brought 'in the judicial district where all the defendants reside, or in which the claim arose.'" *Ante*, at 544. The Court's argument overlooks the fact that since the Government

is willing to provide representation in a suit against a federal officer for money damages, the federal officer is relieved of the greatest burden involved in defending himself.

III

The petitioners also argue that principles of due process militate against construing § 1391 (e) to govern suits against federal officers for money damages. This argument turns on the fact that § 1391 (e) provides not only for expanded venue, but also for nationwide service of process. It is the petitioners' position that a serious due process problem arises when the provisions of § 1391 (e) are taken to mean what they say, so as to permit a federal district court to exercise personal jurisdiction over a federal officer who lacks sufficient "minimum contacts" with the State or district in which the federal court sits.[5]

The petitioners concede that previous cases in this area have involved the Fourteenth Amendment requirement that a state court may acquire personal jurisdiction only if there exist "minimum contacts" between the defendant and the forum State. Reasoning by analogy, however, the petitioners

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[5] The petitioners also argue, on statutory grounds, that § 1391 (e) does not confer personal jurisdiction. It is the petitioners' position that § 1391 (e) was designed only to govern venue and service of process, not to confer personal jurisdiction. The flaw in this argument is that, as a general rule, service of process is the means by which a court obtains personal jurisdiction over a defendant, and in the cases before us the petitioners have failed to demonstrate that there was any defect in the means by which service of process was effected.

It cannot seriously be argued that § 1391 (e) does not authorize extraterritorial service of process, for it provides that in civil actions governed by § 1391 (e) "the delivery of the summons and complaint to the officer or agency as required by the [Federal Rules of Civil Procedure] may be made by certified mail beyond the territorial limits of the district in which the action is brought." The legislative history, moreover, confirms that Congress intended extraterritorial service of process for all cases governed by § 1391 (e). See H. R. Rep. No. 536, 87th Cong., 1st Sess., 4 (1961).

argue that traditional notions of fair play and substantial justice inherent in the Due Process Clause of the Fifth Amendment similarly limit the exercise of congressional power to provide for nationwide *in personam* jurisdiction.

The short answer to this argument is that due process requires only certain minimum contacts between the defendant and the sovereign that has created the court. See *Shaffer* v. *Heitner*, 433 U. S. 186; *International Shoe Co.* v. *Washington*, 326 U. S. 310. The issue is not whether it is unfair to require a defendant to assume the burden of litigating in an inconvenient forum, but rather whether the court of a particular sovereign has power to exercise personal jurisdiction over a named defendant. The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem exists.

This is not to say that a federal officer in a suit for money damages is without recourse in the event he is sued in an inconvenient place. A federal district court is vested with broad authority "[f]or the convenience of parties and witnesses, in the interest of justice, [to] . . . transfer any civil action to any other district . . . where it might have been brought." 28 U. S. C. § 1404 (a). It is not unreasonable to expect that district courts would look sympathetically upon a motion for a change of venue in any case where a federal officer could show that he would be substantially prejudiced if the suit were not transferred to a more convenient forum.

For the reasons stated, I think that § 1391 (e) means exactly what it says, and that its provisions present no constitutional problem whatever. Accordingly, I would affirm the judgments in both of these cases.

Syllabus

FORD MOTOR CREDIT CO. ET AL. *v.* MILHOLLIN* ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1487. Argued December 4, 1979—Decided February 20, 1980

Respondents financed their purchases of automobiles through standard retail installment contracts that were assigned to petitioner finance company. Each contract provided that respondents were to pay a precomputed finance charge, and, as required by the Truth in Lending Act (TILA) and implementing Federal Reserve Board (FRB) Regulation Z, the front page of each contract disclosed and explained certain features of the contract, including a disclosure that the buyer could prepay his obligations under the contract in full at any time prior to maturity of the final installment and that if he did so he would receive a rebate of the unearned portion of the finance charge. The face of the contract also stated that temporary default on a particular installment would result in a delinquency charge, but no mention was made of a clause in the contract giving the creditor a right to accelerate payment of the entire debt upon the buyer's default. Respondents thereafter brought separate suits in District Court, alleging, *inter alia*, that petitioner finance company had violated TILA and Regulation Z by failing to disclose on the front page of the contract that the creditor retained the right to accelerate payment of the debt. The District Court in two of the suits held that facial disclosure of the acceleration clauses was mandated by the provisions of TILA, 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), that compel publication of "default, delinquency, or similar charges payable in the event of late payments." On a consolidated appeal, the Court of Appeals agreed that TILA imposes a general acceleration-clause disclosure requirement, but rather than holding that acceleration is a default charge, the Court of Appeals based its decision on the principle that under Regulation Z the creditor must disclose whether a rebate of unearned interest will be made upon acceleration and also must disclose the method by which the amount of unearned interest will be computed if the debt is accelerated. In so

*Although respondents spell their name "Millhollin," throughout this litigation their name has been misspelled as "Milhollin." Because legal research catalogs and computers are governed by the principle of consistency, not correctness, we feel constrained to adhere to the erroneous spelling.

holding, the court rejected the FRB staff's contrary interpretation of the pertinent statutory and regulatory provisions that specific disclosure of an acceleration rebate policy is only necessary when that policy varies from the custom with respect to voluntary prepayment rebates.

Held: TILA does not mandate a general rule of disclosure for acceleration clauses. Pp. 559–570.

(a) The issue of acceleration disclosure is not governed by clear expression in the statute or regulations. An acceleration clause cannot be equated with a "default, delinquency, or similar charg[e]," subject to disclosure under §§ 1638 (a)(9) and 1639 (a)(7) and Regulation Z, and the prepayment rebate disclosure requirement of Regulation Z also fails to afford direct support for an invariable specific acceleration disclosure rule. Pp. 559–562.

(b) In the absence of an express statutory mandate that acceleration procedures be invariably disclosed, a high degree of deference to the FRB staff's consistent administrative interpretation that the statute and regulations impose no such uniform requirement is warranted. Although the staff might have decided that acceleration rebates are so analytically distinct from identical voluntary prepayment rebates as to warrant separate disclosure, it was reasonable to conclude, alternatively, that ordinary consumers would be concerned chiefly about differing financial consequences. Pp. 562–570.

588 F. 2d 753, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion, in which BURGER, C. J., joined, *post*, p. 570.

William M. Burke argued the cause for petitioners. With him on the briefs were *George R. Richter, Jr.*, *Ronald M. Bayer*, *Herbert H. Anderson*, and *John M. Berman*.

Richard A. Slottee argued the cause for respondents. With him on the brief were *William H. Clendenen, Jr.*, and *Richard Kanter*.

Stuart A. Smith argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General McCree*, *Assistant Attorney General Shenefield*, *John J. Powers III*, and *Marion L. Jetton*.†

†Briefs of *amici curiae* urging reversal were filed by *Roland E. Brandel* for the California Bankers Association; by *Peter D. Schellie* and *Theodore R.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The issue for decision in this case is whether the Truth in Lending Act (TILA), 82 Stat. 146, as amended, 15 U. S. C. § 1601 *et seq.*, requires that the existence of an acceleration clause always be disclosed on the face of a credit agreement. The Federal Reserve Board staff has consistently construed the statute and regulations as imposing no such uniform requirement. Because we believe that a high degree of deference to this administrative interpretation is warranted, we hold that TILA does not mandate a general rule of disclosure for acceleration clauses.

I

The several respondents in this case purchased automobiles from various dealers, financing their purchases through standard retail installment contracts that were assigned to petitioner Ford Motor Credit Co. (FMCC), a finance company. Each contract provided that respondents were to pay a precomputed finance charge. As required by TILA and Federal Reserve Board Regulation Z, which implements the Act, the front page of each contract disclosed and explained certain features of the agreement. See 15 U. S. C. § 1631; 12 CFR § 226.6 (a) (1979). Among these disclosures was a paragraph informing the buyer that he

> "may prepay his obligations under this contract in full at any time prior to maturity of the final instalment hereunder, and, if he does so, shall receive a rebate of the unearned portion of the Finance Charge computed under the sum of the digits method. . . ."

The face of the contract also stated that temporary default on a particular installment would result in a predetermined

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Boehm for the Consumer Bankers Association; and by *William H. Allen* and *Vernon L. Evans* for the National Consumer Finance Association et al.

Margaret S. Rigg and *Willard P. Ogburn* filed a brief for the National Clients Council, Inc., as *amicus curiae* urging affirmance.

delinquency charge. Not mentioned on the disclosure page was a clause in the body of the contract giving the creditor a right to accelerate payment of the entire debt upon the buyer's default.[1]

Respondents subsequently commenced four separate suits against FMCC in the United States District Court for the District of Oregon, alleging, *inter alia*, that FMCC had violated TILA and Regulation Z by failing to disclose on the front page of the contract that the creditor retained the right to accelerate payment of the debt.[2] In two of the suits,[3] the District Court held that facial disclosure of the acceleration clauses was mandated by the provision of TILA that compels publication of "default, delinquency, or similar charges payable in the event of late payments," 15 U. S. C. §§ 1638 (a) (9), 1639 (a)(7). App. 30–31, 37, 69–71. Respondents in the other two actions prevailed on different grounds.[4] All four cases were consolidated on appeal to the Ninth Circuit.

The Court of Appeals agreed with the District Court that TILA imposes a general acceleration-clause disclosure requirement.[5] Rather than resting on the District Court's holding that acceleration is a default charge, however, the Court of Appeals based its decision on the narrower principle that under Regulation Z "[t]he creditor must disclose whether a rebate of unearned interest will be made upon acceleration

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[1] "In the event Buyer defaults in any payment . . . Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable. . . ."

[2] The individual suits were *Milhollin* v. *Ford Motor Credit Co.*, Civ. No. 75–334 (1976); *Eaton* v. *Ford Motor Credit Co.*, Civ. No. 76–575 (1977); *Andresen* v. *Ford Motor Credit Co.*, Civ. No. 76–1090 (1977); and *Messinger* v. *Ford Motor Credit Co.*, Civ. No. 76–475 (1977).

[3] *Milhollin* and *Eaton*, *supra* n. 2.

[4] *Andresen* and *Messinger*, *supra* n. 2.

[5] The Court of Appeals rejected the grounds for TILA liability relied upon by the District Court in *Andresen* and *Messinger*, and remanded those two cases for consideration under the acceleration-clause theory.

and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." 588 F. 2d 753, 757 (1978), quoting *St. Germain* v. *Bank of Hawaii*, 573 F. 2d 572, 577 (CA9 1977). See 12 CFR § 226.8 (b)(7) (1979). Implicit in the conclusion of the Court of Appeals—and explicit in its preceding *St. Germain* decision—was the rejection of a contrary administrative interpretation of the pertinent statutory and regulatory provisions. In adopting its particular approach, the Court of Appeals mapped a path through the disclosure thicket that diverges from the routes traveled by the Courts of Appeals for several other Circuits.[6] We granted certiorari, 442 U. S. 940 (1979), to resolve the conflict. We reverse.

II

The Truth in Lending Act has the broad purpose of promoting "the informed use of credit" by assuring "meaningful disclosure of credit terms" to consumers. 15 U. S. C. § 1601. Because of their complexity and variety, however, credit transactions defy exhaustive regulation by a single statute. Congress therefore delegated expansive authority to

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[6] The Courts of Appeals for the Eighth and Tenth Circuits have flatly declared that a creditor's rebate practice upon acceleration never need be disclosed. *Griffith* v. *Superior Ford*, 577 F. 2d 455 (CA8 1978); *United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F. 2d 978 (CA10 1978). The Courts of Appeals for the Third and District of Columbia Circuits have held that acceleration rebate policies need not be separately disclosed when state law or the contract compels the creditor to rebate under acceleration, as under voluntary prepayment. *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F. 2d 257 (CA3 1975); *Price* v. *Franklin Investment Co.*, 187 U. S. App. D. C. 383, 574 F. 2d 594 (1978). The Court of Appeals for the Fifth Circuit has also adopted the position that separate disclosure is not required when the creditor is obliged to treat acceleration and voluntary prepayment alike for rebate purposes; that court has emphasized that the critical factor is the creditor's legal obligation to rebate, rather than its unbidden rebate policy. *McDaniel* v. *Fulton Nat. Bank*, 571 F. 2d 948 (en banc), clarified, 576 F. 2d 1156 (1978) (en banc).

the Federal Reserve Board to elaborate and expand the legal framework governing commerce in credit. 15 U. S. C. § 1604; *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973). The Board executed its responsibility by promulgating Regulation Z, 12 CFR Part 226 (1979), which at least partly fills the statutory gaps. Even Regulation Z, however, cannot speak explicitly to every credit disclosure issue. At the threshold, therefore, interpretation of TILA and Regulation Z demands an examination of their express language; absent a clear expression, it becomes necessary to consider the implicit character of the statutory scheme. For the reasons following we conclude that the issue of acceleration disclosure is not governed by clear expression in the statute or regulation, and that it is appropriate to defer to the Federal Reserve Board and staff in determining what resolution of that issue is implied by the truth-in-lending enactments.

Respondents have advanced two theories to buttress their claim that the Act and regulation expressly mandate disclosure of acceleration clauses. In the District Court, they contended that acceleration clauses were comprehended by the general statutory prescription that a creditor shall disclose "default, delinquency, or similar charges payable in the event of late payments," 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), and were included within the provision of Regulation Z requiring disclosure of the "amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments," 12 CFR § 226.8 (b)(4) (1979). Before this Court, respondents follow the Court of Appeals in arguing that 12 CFR § 226.8 (b)(7) may be the source of an obligation to disclose procedures governing the rebate of unearned finance charges that accrue under acceleration. That section commands

> "[i]dentification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes pre-

> computed finance charges and a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to an obligation or refunded to the customer."

A fair reading of the pertinent provisions does not sustain respondents' contention that acceleration clauses are within their terms.

An acceleration clause cannot be equated with a "default, delinquency, or similar charg[e]," subject to disclosure under 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7), and 12 CFR § 226.8 (b)(4). The prerogative of acceleration affords the creditor a mechanism for collecting the outstanding portion of a debt on which there has been a partial default. In itself, acceleration entails no monetary penalty, although a creditor may independently impose such a penalty, for example, by failing to rebate unearned finance charges. A "default, delinquency, or similar *charg*[*e*]," on the other hand, self-evidently refers to a specific assessable sum. Thus, within the trade, delinquency charges are understood to be "the *compensation* a creditor receives on a precomputed contract for the debtor's delay in making timely instalment payments," 1 CCH Consumer Credit Guide ¶¶ 4230, 4231 (1977) (emphasis added). Acceleration is not compensatory; a creditor accelerates to avoid further delay by demanding immediate payment of the outstanding debt. See *id.*, ¶ 4231; Uniform Consumer Credit Code of 1968, § 2.203, official comment 2, 7 U. L. A. 315–316 (1978); § 2.204 (3), *id.*, at 317.

The language employed in TILA §§ 1638 (a)(9) and 1639 (a)(7), and in 12 CFR § 226.8 (b)(4) (1979), confirms the interpretation of "charges" as specific penalty sums. The statutory provisions speak of "charges *payable* in the event of late payments." (Emphasis added.) Even if one considers the burdensomeness of acceleration as a form of "charge" upon the debtor, it would hardly make sense to speak of

that burden as "payable" to the creditor. Similarly Regulation Z orders disclosure of the *"amount, or method of computing the amount,* of any default, delinquency, or similar charges. . . ." (Emphasis added.) That command has no sensible application to the remedy of acceleration. In short, we would have to stretch these provisions beyond their obvious limits to construe them as a mandate for the disclosure of acceleration clauses.[7]

The prepayment rebate disclosure regulation, 12 CFR § 226.8 (b)(7) (1979), also fails to afford direct support for an invariable specific acceleration disclosure rule. To be sure, payment by the debtor in response to acceleration might be deemed a prepayment within the ambit of that regulation. But so long as the creditor's rebate practice under acceleration is identical to its policy with respect to voluntary prepayments, *separate* disclosure of the acceleration policy does not seem obligatory under a literal reading of the regulation. Section 226.8 (b)(7), therefore, squares with the position of the Federal Reserve Board staff that specific disclosure of acceleration rebate policy is only necessary when that policy varies from the custom with respect to voluntary prepayment rebates. FRB Official Staff Interpretation No. FC–0054, 12 CFR Part 226 Appendix, p. 627 (1979).

III

Notwithstanding the absence of an express statutory mandate that acceleration procedures be invariably disclosed, the

[7] Seven of the Courts of Appeals, including that for the Ninth Circuit, have refused to treat acceleration *simpliciter* as a "charge" within 15 U. S. C. § 1638 (a)(9) and 12 CFR § 226.8 (b)(4) (1979). *Johnson* v. *McCrackin-Sturman Ford, Inc.*, 527 F. 2d, at 265–268 (CA3); *McDaniel* v. *Fulton Nat. Bank*, 576 F. 2d, at 1157 (CA5) (en banc); *Croysdale* v. *Franklin Sav. Assn.*, 601 F. 2d 1340, 1342–1343, and n. 2 (CA7 1979); *Griffith* v. *Superior Ford*, 577 F. 2d, at 457–459 (CA8); *St. Germain* v. *Bank of Hawaii*, 573 F. 2d 572, 573–574 (CA9 1977); *United States ex rel. Hornell* v. *One 1976 Chevrolet*, 585 F. 2d, at 981 (CA10); *Price* v. *Franklin Investment Co.*, 187 U. S. App. D. C., at 393, 574 F. 2d, at 604.

Court of Appeals has held that the "creditor must [always] disclose whether a rebate of unearned interest will be made upon acceleration and also disclose the method by which the amount of unearned interest will be computed if the debt is accelerated." *St. Germain* v. *Bank of Hawaii*, 573 F. 2d, at 577; accord, 588 F. 2d, at 757–758. In so deciding, the Court of Appeals in *St. Germain* explicitly rejected the view of the Federal Reserve Board staff that the right of acceleration need *not* be disclosed, and that rebate practice under acceleration must be disclosed only if it differs from the creditor's rebate policy with respect to voluntary prepayment. FRB Official Staff Interpretation No. FC–0054, *supra;* see FRB Public Information Letter No. 851, [1974–1977 Transfer Binder] CCH Consumer Credit Guide ¶ 31,173; FRB Public Information Letter No. 1208, *id.*, ¶ 31,647; FRB Public Information Letter No. 1324, 5 CCH Consumer Credit Guide ¶ 31,827 (1979).[8] Rather, *St. Germain* declared that it would

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[8] Official Staff Interpretation No. FC–0054 provides, in pertinent part: "It is staff's opinion that the phrase 'default, delinquency, or similar charges in the event of late payments,' found in § 128 (a) (9) and § 129 (a) (7) of the Truth in Lending Act and § 226.8 (b) (4) of Regulation Z, refers to specific sums assessed against a borrower solely because of failure to make payments when due. It is staff's opinion that the mere right to accelerate contained in a contractual provision which sets out the creditor's right to accelerate the entire obligation upon a certain event (generally the obligor's failure to make a payment when due) is not a *charge* payable in the event of late payment. Therefore, it need not be disclosed under § 226.8 (b) (4).

"Your [*sic*] refer to a prior Public Information Letter, No. 851, which discusses the right of acceleration. . . . Staff understands that letter to say that early payment of the balance of a precomputed finance charge obligation by a customer upon acceleration by the creditor is essentially the same as a prepayment of the obligation. Therefore, if the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed under § 226.8 (b) (7) when the customer pays the balance of the obligation upon acceleration, any amounts retained beyond those which would have been rebated under the disclosed rebate provisions

"choose the direction that makes more sense to us in trying to achieve the congressional purpose of providing meaningful disclosure to the debtor about the costs of his borrowing." 573 F. 2d, at 576–577.

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do represent the type of charge that must be disclosed under § 226.8 (b)(4)." (Emphasis added.)

Information Letter No. 851 states, in part:

"For the purposes of Truth in Lending disclosures, this staff views an acceleration of payments as essentially a prepayment of the contract obligation. As such, the disclosure provisions of § 226.8 (b)(7) . . . of the Regulation, which require the creditor to identify the method of rebating any unearned portion of the finance charge or to disclose that no rebate would be made, apply. If the creditor rebates under one method for acceleration and another for voluntary prepayment, both methods would need to be identified under § 226.8 (b)(7). . . .

"If, under the acceleration provision, a rebate is made by the creditor in accordance with the disclosure of the rebate provisions of § 226.8 (b)(7), we believe that there is no *additional* 'charge' for late payments made by the customer and therefore no need to disclose under the provisions of § 226.8 (b)(4). On the other hand, if upon acceleration of the unpaid remainder of the total of payments, the creditor does not rebate unearned finance charges in accordance with the rebate provisions disclosed in § 226.8 (b)(7), any amounts retained beyond those which would have been rebated under the disclosed rebate provisions represent a 'charge' which should be disclosed under § 226.8 (b)(4)."

Information Letter No. 1208 states, in part:

"In FC–0054, staff took the position that a creditor's right of acceleration upon default by the obligor need not be disclosed as a default, delinquency, or late payment charge within the context of § 226.8 (b)(4). The interpretation went on to state, however, that since early payment of the balance of an obligation upon acceleration is essentially the same as voluntary prepayment, if the creditor does not rebate unearned finance charges in the former situation in accordance with the rebate provisions disclosed under § 226.8 (b)(7), any extra amounts retained represent the type of charge that must be disclosed under § 226.8 (b)(4)."

Information Letter No. 1324 states, in part:

"The staff's position . . . is that if a creditor rebates unearned finance charges in connection with prepayment upon acceleration using the same method as for voluntary prepayment and that method has been properly

It is a commonplace that courts will further legislative goals by filling the interstitial silences within a statute or a regulation. Because legislators cannot foresee all eventualities, judges must decide unanticipated cases by extrapolating from related statutes or administrative provisions. But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

At the very least, that caution requires attentiveness to the views of the administrative entity appointed to apply and enforce a statute. And deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. Unless demonstrably irrational, Federal Reserve Board staff opinions construing the Act or Regulation should be dispositive for several reasons.

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disclosed in accordance with § 226.8 (b)(7), there is no default charge. However, any amounts retained by a creditor upon acceleration which would have been rebated under the disclosed rebate provisions would represent the type of default charge which must be disclosed pursuant to § 226.8 (b)(4)."

In *St. Germain*, the Court of Appeals spurned these administrative opinions as a source of interpretive guidance on the ground that the several letters were "conflicting signals." 573 F. 2d, at 576. As we read the Staff Opinion and Letters, however, they are fundamentally consistent, if somewhat inartfully drafted. The staff's position in each appears to be that separate disclosure of acceleration rebate practices is unnecessary when those practices parallel voluntary prepayment rebate policy. On the other hand, where acceleration rebates are less than voluntary prepayment rebates, acceleration policy must be separately explained under § 226.8 (b)(4) and, perhaps as well, under § 226.8 (b)(7). Neither the Opinion nor the Letters suggest that acceleration rebate policy must be separately disclosed in all instances.

The Court has often repeated the general proposition that considerable respect is due "'the interpretation given [a] statute by the officers or agency charged with its administration.'" *Zenith Radio Corp.* v. *United States*, 437 U. S. 443, 450 (1978), quoting *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965); see, *e. g.*, *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 408 (1961). An agency's construction of its own regulations has been regarded as especially due that respect. See *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414 (1945). This traditional acquiescence in administrative expertise is particularly apt under TILA, because the Federal Reserve Board has played a pivotal role in "setting [the statutory] machinery in motion. . . ." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294, 315 (1933). As we emphasized in *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA. The Act is best construed by those who gave it substance in promulgating regulations thereunder.[9]

Furthermore, Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law. Because creditors need sure guidance through the "highly technical" Truth in Lending Act, S. Rep. No. 93–278, p. 13 (1973), legislators have twice acted to promote reliance upon Federal Reserve pronouncements. In 1974, TILA was amended to

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[9] To be sure, the administrative interpretations proffered in this case were issued by the Federal Reserve staff rather than the Board. But to the extent that deference to administrative views is bottomed on respect for agency expertise, it is unrealistic to draw a radical distinction between opinions issued under the imprimatur of the Board and those submitted as official staff memoranda. See FRB Public Information Letter No. 444, [1969–1974 Transfer Binder] CCH Consumer Credit Guide ¶ 30,640. At any rate, it is unnecessary to explore the Board/staff difference at length, because Congress has conferred special status upon official staff interpretations. See 15 U. S. C. § 1640 (f); 12 CFR § 226.1 (d) (1979).

provide creditors with a defense from liability based upon good-faith compliance with a "rule, regulation, or interpretation" of the Federal Reserve Board itself. § 406, 88 Stat. 1518, codified at 15 U. S. C. § 1640 (f). The explicit purpose of the amendment was to relieve the creditor of the burden of choosing "between the Board's construction of the Act and the creditor's own assessment of how a court may interpret the Act." S. Rep. No. 93–278, *supra*, at 13. The same rationale prompted a further change in the statute in 1976, authorizing a liability defense for "conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals. . . ." § 3 (b), 90 Stat. 197, codified at 15 U. S C. § 1640 (f); see 122 Cong. Rec. 2836 (1976) (remarks of Sen. Garn); *id.*, at 2852 (remarks of Rep. Annunzio, chairman of Consumer Affairs Subcommittee); *ibid.* (remarks of Rep. Rousselot); 121 Cong. Rec. 36927 (1975) (remarks of Rep. Annunzio); *id.*, at 36927–36928 (remarks of Rep. Wylie).[10]

The enactment and expansion of § 1640 (f) has significance beyond the express creation of a good-faith immunity.[11] That statutory provision signals an unmistakable congressional decision to treat administrative rulemaking and inter-

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[10] Title 12 CFR § 226.1 (d) (1979) authorizes the issuance of official staff interpretations that trigger the application of § 1640 (f). Official interpretations are published in the Federal Register, and opportunity for public comment may be requested. 12 CFR § 226.1 (d). Unofficial interpretations have no special status under § 1640 (f).

[11] Although FMCC claims that its pre-1976 disclosure policy comported with Official Staff Interpretation No. FC–0054 (issued in 1977), it has not argued before this Court that it is entitled to the immunity afforded by the 1976 amendment to § 1640 (f). We need not decide, therefore, whether the 1976 amendment may be invoked with respect to contracts formed before its enactment or whether conformity with a subsequently issued official staff interpretation constitutes "compliance" within the terms of § 1640 (f).

pretation under TILA as authoritative. Moreover, language in the legislative history evinces a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation.[12] See S. Rep. No. 93–278, *supra*, at 13–14; 122 Cong. Rec. 2852 (1976) (remarks of Rep. Annunzio); 121 Cong. Rec. 36927 (1975) (remarks of Rep. Annunzio). Courts should honor that congressional choice. Thus, while not abdicating their ultimate judicial responsibility to determine the law, cf. generally *SEC* v. *Chenery Corp.*, 318 U. S. 80, 92–94 (1943), judges ought to refrain from substituting their own interstitial lawmaking for that of the Federal Reserve, so long as the latter's lawmaking is not irrational.

Finally, wholly apart from jurisprudential considerations or congressional intent, deference to the Federal Reserve is compelled by necessity; a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views. The concept of "meaningful disclosure" that animates TILA, see *St. Germain*, 573 F. 2d, at 577, cannot be applied in the abstract. *Meaningful* disclosure does not mean *more* disclosure. Rather, it describes a balance between "competing considerations of complete disclosure . . . and the need to avoid . . . [informational overload]." S. Rep 96–73, p. 3 (1979) (accompanying S. 108, Truth in Lending Simplification and Reform Act); see S. Rep. No. 95–720, pp. 2–3 (1978); 63 Federal Reserve Board Ann. Rep. 326, 349–350 (1976); Comment, Acceleration Clause Disclosure Under the Truth in Lending Act, 77 Colum. L. Rev. 649, 662–663 (1977). And striking the appropriate balance is an empirical process that entails investigation into consumer psychology and that presupposes

[12] That preference is understandable. As the divergence of judicial views on the acceleration disclosure issue illustrates, see n. 6, *supra*, litigation is not always the optimal process by means of which to formulate a coherent and predictable body of technical rules.

broad experience with credit practices. Administrative agencies are simply better suited than courts to engage in such a process.

The Federal Reserve Board staff treatment of acceleration disclosure rationally accommodates the conflicting demands for completeness and for simplicity. In determining that acceleration rebate practices need be disclosed only when they diverge from other prepayment rebate practices, the Federal Reserve has adopted what may be termed a "bottom-line" approach: that the most important information in a credit purchase is that which explains differing net charges and rates. Cf. S. Rep. No. 96–73, *supra*, at 3–4; 63 Federal Reserve Board Ann. Rep., *supra*, at 350–352. Although the staff might have decided that acceleration rebates are so analytically distinct from identical voluntary prepayment rebates as to warrant separate disclosure, it was reasonable to conclude, alternatively, that ordinary consumers would be concerned chiefly about differing financial consequences.[13]

[13] The Federal Reserve might reasonably have adopted the disclosure approach of the Court of Appeals for the Fifth Circuit, focusing upon a creditor's contractual acceleration rebate *rights*, rather than upon the creditor's operating rebate *policy*. See *McDaniel* v. *Fulton Nat. Bank*, 576 F. 2d, at 1157. But, again, it was equally logical to conclude that so long as the creditor's actual practice upon acceleration was the same as its practice upon prepayment, it was not necessary to require disclosure of the creditor's unexercised rights in the disclosure statement itself.

In arguing for affirmance, respondents contend that disclosure of a creditor's rebate policy at the time of credit contract formation is no guarantee against a change in that policy at some future date, perhaps after the TILA statute of limitations has run. See 15 U. S. C. § 1640 (e). But when a genuine change in policy occurs after disclosure, the statute itself may arguably contemplate that the creditor be immune from liability. See 15 U. S. C. § 1634; S. Rep. No. 392, 90th Cong., 1st Sess., 18 (1967). On the other hand, if the creditor envisioned a change in policy at the time it disclosed practices contemporaneously in force, then the debtor might conceivably have a claim for fraud. In any event, it is open to the Federal Reserve to consider this question when reviewing its position on acceleration rebate disclosure.

Faced with an apparent lacuna in the express prescriptions of TILA and Regulation Z, the Court of Appeals had no ground for displacing the Federal Reserve staff's expert judgment.

Accordingly, we decide that the Court of Appeals erred in rejecting the views of the Federal Reserve Board and staff, and holding that separate disclosure of acceleration rebate practices is always required.[14]

Reversed and remanded.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion but write separately because I do not fully agree with the statement in note 13 of the opinion, *ante*, at 569, that the Federal Reserve Board's approach to the disclosure of acceleration rebates is "equally logical" with other alternatives it might have chosen. In particular, I am concerned that the Board's emphasis on a creditor's rebate *policy* rather than its contract *rights* steers the Truth in Lending Act away from the moorings of contract law in a manner that may not prove salutary for the welfare of consumers of financial credit.

To be sure, consumers contemplating installment purchases are concerned with the "bottom line," *ante*, at 569, of how much they will be required to pay. But there is little doubt, in my view, that consumers who read the required disclosures

[14] Respondents argue before this Court that even under the Federal Reserve staff's view, petitioners violated TILA and Regulation Z because the credit contract itself contained language concerning acceleration rebates that assertedly contradicted the disclosures on the face of the contract. That contradiction, if present, could run afoul of 12 CFR § 226.8 (b)(7) or § 226.6 (c) (1979), as those provisions are understood by the agency staff. See FRB Public Information Letter No. 1324, *supra* n. 8. But respondents prevailed in the District Court and in the Court of Appeals upon broader rulings that acceleration clause disclosure was generally required; neither court addressed the specific allegation of contradiction. Therefore, if properly presented, the contradiction issue is open for decision on remand.

think that they are reading a description of their legal rights and obligations, and not merely an explanation of "practices" or "policies" of the creditor that may be changed to their detriment at the creditor's will. Although there may be reason to believe that a major finance company, such as Ford Motor Credit Co., will adhere to its rebate practices despite the legal right to demand more upon acceleration than it said it would, I am not sanguine that a less responsible organization always will do the same. The result could be confusion and unanticipated financial loss, as well as fruitless litigation.

Ultimately, I think the interpretation adopted by the Fifth Circuit in *McDaniel* v. *Fulton Nat. Bank*, 571 F. 2d 948 (en banc), clarified, 576 F. 2d 1156 (1978) (en banc), which requires disclosure of the creditor's right to retain finance charges upon acceleration when it differs from the right to such charges upon prepayment, may prove to be a sounder and more durable application of the statute than the position currently adopted by the Board. Nevertheless, I agree with the Court that the Board's approach is reasonable. In order to uphold the Board's position, "we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall* v. *Tallman*, 380 U. S. 1, 16 (1965), quoting *Unemployment Comm'n* v. *Aragon*, 329 U. S. 143, 153 (1946). Accordingly, I agree that the courts should not add to the disclosure obligations that the Board has outlined through its staff opinions.

SEATRAIN SHIPBUILDING CORP. ET AL. *v.* SHELL OIL CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78–1651. Argued November 28, 1979—Decided February 20, 1980

Petitioner Seatrain Shipbuilding Corp. (Seatrain) received a construction-differential subsidy (CDS) under Title V of the Merchant Marine Act, 1936 (Act), to construct a supertanker, and, as required by § 506 of the Act, Seatrain and petitioner Polk Tanker Corp., the initial owner of the vessel, agreed to operate it exclusively in foreign trade except as otherwise authorized in § 506. When the vessel was completed, petitioners asked the Secretary of Commerce to terminate all restrictions on the vessel's operation in domestic trade in exchange for their fully secured note repaying in full the vessel's CDS. The Secretary granted their application. Thereafter, certain competitors in the domestic trade (respondents) brought suit in District Court seeking declaratory and injunctive relief prohibiting the Secretary from granting a permanent release from the § 506 foreign-trade-only requirement. The District Court held, *inter alia*, that the Secretary had the authority permanently to release vessels from trade restrictions imposed pursuant to § 506 in exchange for full CDS repayment, but remanded the case to the Secretary for consideration of the competitive consequences of granting the release in question. Apparently relying on Federal Rule of Civil Procedure 54 (b), the court subsequently certified its decision as a "final judgment." The Court of Appeals reversed, concluding that by specifying certain exceptions to the foreign-trade-only requirement § 506 occupied the field and impliedly prohibited the Secretary from making any other exceptions under the Act's more general provisions.

Held:

1. The District Court's determination that the Secretary was empowered to waive permanently the restrictions required by § 506 was a "final decision" certifiable under Rule 54 (b) and appealable to the Court of Appeals under 28 U. S. C. § 1291, and thus this Court has jurisdiction to hear the case. Although respondents' claim that the Secretary's waiver of § 506 restrictions as to petitioners' vessel was an abuse of discretion caused the District Court to remand to the agency for consideration of the economic consequences of granting the release, respondents' request for a general declaration that the Secretary lacks

authority to grant a permanent release from § 506 restrictions under any circumstances was finally decided and meets the case-or-controversy requirement of Art. III of the Constitution. Pp. 579–584.

2. The Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority to grant permanent releases. The specific exceptions to the foreign-trade-only requirement in § 506 speak only to *temporary* releases from that requirement, and nothing in § 506, or in any other provision of Title V of the Act, either expressly or implicitly addresses the issue of permanent revocation of a CDS contract. Furthermore, the legislative history does not demonstrate that Congress intended to rule out permanent releases of the type involved here, and the agency has consistently concluded that the Act permits such releases. Pp. 584–596.

194 U. S. App. D. C. 7, 595 F. 2d 814, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

William E. McDaniels argued the cause for petitioners. With him on the briefs were *John W. Vardaman, Jr., Neal M. Mayer,* and *Jonathan Blank.*

Andrew J. Levander argued the cause *pro hac vice* for the federal parties as respondents under this Court's Rule 21 (4) in support of petitioners. With him on the briefs were *Solicitor General McCree, Acting Assistant Attorney General Daniel, Ronald R. Glancz, Michael Kimmel,* and *Michael J. McMorrow.*

Amy Loeserman Klein and *Stephen N. Shulman* argued the cause for respondents. With Ms. Klein on the brief for respondents Alaska Bulk Carriers, Inc., et al. were *William Karas, Francis Ballard,* and *Alan G. Choate.* With Mr. Shulman on the brief for respondent Shell Oil Co. were *Joseph A. Artabane* and *Mark C. Ellenberg.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

In 1972, petitioner Seatrain Shipbuilding Corp. (Seatrain) received a construction-differential subsidy (CDS) of $27.2

million pursuant to Title V of the Merchant Marine Act, 1936, 49 Stat. 1995, as amended, 46 U. S. C. § 1151 *et seq.*, to construct the 225,000-deadweight-ton supertanker *Stuyvesant*. As required by § 506 of the Act, 46 U. S. C. § 1156, Seatrain and its affiliate, petitioner Polk Tanker Corp., the initial owner of the *Stuyvesant*, agreed to operate the supertanker exclusively in the foreign trade except as otherwise authorized in that section. By the time the vessel was completed in 1977, however, petitioners wanted to operate it in the domestic trade. Accordingly, they asked the Secretary of Commerce permanently to lift all restrictions on the *Stuyvesant*'s operation in domestic commerce in exchange for their fully secured, 20-year interest-bearing note repaying in full the vessel's CDS. The Secretary granted the application, accepted the promissory note, and deleted the applicable restrictions from the CDS contract. The primary question for decision is whether the Secretary of Commerce may terminate the restrictions imposed pursuant to § 506 when the owners of a vessel constructed with a CDS repay that subsidy in full. The District Court for the District of Columbia concluded that the Secretary had such authority, *Shell Oil Co.* v. *Kreps*, 445 F. Supp. 1128 (1977). The Court of Appeals for the District of Columbia Circuit disagreed and reversed. *Alaska Bulk Carriers, Inc.* v. *Kreps*, 194 U. S. App. D. C. 7, 595 F. 2d 814 (1979). We granted certiorari. 442 U. S. 940 (1979). We reverse.

I

The costs of constructing ships in American shipyards and manning them with American crews are higher than comparable costs in foreign ports. Accordingly, Congress has taken a number of steps to protect and support the United States' shipping and shipbuilding industries. The Jones Act, 46 U. S. C. § 883, has, since 1920, reserved the United States domestic trade exclusively for vessels built in this country and

owned by its citizens.[1] The Merchant Marine Act, 1936, 46 U. S. C. § 1101 *et seq.*, established a number of programs to help American vessels compete effectively in foreign trade with vessels constructed and staffed abroad. Specifically, Title V of that Act, 46 U. S. C. § 1151 *et seq.*, authorizes the Secretary of Commerce to grant a CDS for up to 50% of the cost of constructing a ship in this country. The owners of vessels built with these subsidies are required by § 506, 46 U. S. C. § 1156,[2] to agree that they will operate only in for-

[1] Some form of prohibition on use of foreign vessels in domestic trade predates the Jones Act by more than a century. See, *e. g.*, Act of Mar. 1, 1817, 3 Stat. 351. See generally G. Gilmore & C. Black, The Law of Admiralty 963, and nn. 34 and 35 (2d ed. 1975).

[2] Section 506 of the Act, 49 Stat. 1999, as amended, 46 U. S. C. § 1156, provides as follows:

"Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period."

eign trade unless they come within one of two explicit statutory exceptions. Neither exception may be invoked unless the owner remits to the Government an appropriate pro rata portion of the outstanding subsidy.

In 1969, petitioner Seatrain began constructing a series of supertankers at the former Brooklyn Navy Yard. The venture received substantial amounts of federal aid. By its completion, the Economic Development Administration (EDA) of the Department of Commerce had advanced $5 million as a direct loan and had guaranteed 90% of $82 million in loans from other sources to help finance modernization and operation of the Navy Yard facilities and a major on-the-job training program.[3] Moreover, the Department granted a CDS for each of the four supertankers built by Seatrain,[4] in addition to guaranteeing various construction loans.

The *Stuyvesant* was the third of the Seatrain tankers.[5] In the mid-1970's, while it was under construction, demand for such vessels began to decline in the wake of the Arab oil embargo, increasing crude oil prices and the economic problems that ensued.[6] By 1977, when the vessel was completed,

[3] Seatrain also invested some $38 million of its own funds in the project.

[4] The first two tankers, the *Brooklyn* and the *Williamsburg*, initially found employment in the foreign trade and subsequently were placed in layup. App. 112. The decision in this case may have some bearing on the fate of the fourth, the *Bay Ridge*. See *infra*, at 580–582.

[5] In addition to the $27.2 million CDS, loans of $30.2 million were guaranteed under Title XI of the Act, 46 U. S. C. § 1271 *et seq.*, for construction of the *Stuyvesant*. Similar financial support was made available for the *Bay Ridge*, which received a CDS of $28.8 million and Title XI loan guarantees of $34.5 million.

[6] This drop in tanker demand had caused Seatrain to halt construction of both the *Stuyvesant* and the *Bay Ridge* in early 1975—a halt that necessitated the layoff of most of the shipyard's 2,500 employees and virtually shut the facility down. The yard reopened and construction resumed only after the EDA provided 90% guarantees for additional bank loans of $40 million. From that time on Seatrain apparently was on the lookout for prospects for employing the two supertankers in the domestic trade.

there was a significant oversupply of tankers on the world market and no opportunity in foreign trade for the fledgling *Stuyvesant*. Foreseeing this problem, the owners had begun to explore prospects for employing the vessel in the transportation of Alaskan crude from Valdez around Cape Horn to the Eastern United States and the Caribbean. This relatively new trade required sizeable tankers, and since the Jones Act restricted it to American-flag vessels[7] the demand remained high despite the abundance of otherwise suitable foreign vessels.

In mid-1977, petitioner Polk Tanker Corp. executed an agreement with Standard Oil of Ohio (SOHIO) for a 3-year charter of the *Stuyvesant* for use in the Alaskan trade. The agreement was conditioned upon Polk's obtaining from the Secretary of Commerce a release from the foreign-trade-only restriction imposed pursuant to § 506. This was obtained at the end of August[8] in the form of letters to Polk and Queensway Tankers, Inc., the proposed operator of the vessel. Those letters recited the findings upon which the agency based its decision. These were: (1) that there were no other opportunities for employment of the *Stuyvesant*, (2) that the SOHIO charter would strengthen the collateral securing obligations the Government had guaranteed, (3) that the charter might prevent default on those obligations, and (4) that failure to approve the proposal would jeopardize the continued operation of Seatrain.[9]

The complex closing of several transactions necessary to finance repayment of the CDS, refinance various other obligations, and transfer the *Stuyvesant* to new owners and operators

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[7] See 46 U. S. C. § 883; n. 1, *supra*.

[8] The preceding month, Polk had sought permission to operate the *Stuyvesant* in coastal trade for three years in exchange for pro rata repayment of the CDS. This application was withdrawn in the face of strong protests from prospective competitors.

[9] Letter of James S. Dawson, Jr., Secretary of Maritime Administration, to Polk Tanker Corp., Aug. 31, 1977, App. 530.

was scheduled for September 23, 1977. On September 22, respondents, three competitors in the Alaskan trade, brought suit in the District Court for the District of Columbia against various Department of Commerce officials. The complaints sought declaratory and injunctive relief prohibiting the Secretary from granting a permanent release from the § 506 foreign-trade-only requirement.[10] They argued (1) that the Secretary lacked authority to grant such a release and (2) that, even if the Secretary had authority to do so in certain cases, that authority should not have been exercised with regard to the *Stuyvesant*. In addition, they alleged violations of various procedural requirements of the Administrative Procedure Act and asserted that the Secretary was without power to accept a promissory note as repayment for the CDS. Petitioners Seatrain and Polk were permitted to intervene as defendants.

On November 22, 1977, ruling on the parties' cross-motions for summary judgment, the District Court held (1) that the Secretary had the authority to release vessels from trade restrictions imposed pursuant to § 506 in exchange for full CDS repayment and could accept a promissory note, (2) that releasing the *Stuyvesant* from such restrictions without analyzing the economic effect of that vessel's entry into the Alaskan trade was an abuse of discretion, and (3) that there existed material issues of fact which made summary judgment on portions of the Administrative Procedure Act claim improper. The court remanded the case to the Secretary for consideration of the competitive consequences of the *Stuyvesant* decision.[11] Eight days later, on the motion of the respondents,

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[10] Two separate complaints were filed, one by Alaska Bulk Carriers, Inc., and Trinidad Corp., and the other by Shell Oil Co. They were consolidated before the District Court.

[11] The remand proceedings were completed on January 6, 1978, prior to oral argument in the Court of Appeals. The Secretary concluded that there would continue to be a shortage of tankers in the Alaskan trade for the foreseeable future and that the entry of the *Stuyvesant* into that trade

the court amended its decision by dismissing the Administrative Procedure Act claim and—relying on Rule 54 (b) of the Federal Rules of Civil Procedure—certifying its decision as a "final judgment." [12]

Respondents appealed from this certified final judgment, and a divided panel of the Court of Appeals reversed, concluding that by specifying two exceptions to the foreign-trade-only requirement § 506 occupied the field and impliedly prohibited the Secretary from making any other exceptions under the Act's more general provisions. 194 U. S. App. D. C., at 15–22, 595 F. 2d, at 822–829. Judge Bazelon dissented, *id.*, at 33, 595 F. 2d, at 840, stating that he would hold that § 506 did not limit the Secretary's power in this regard. He observed that after full repayment of the CDS and appropriate interest the *Stuyvesant* would be on precisely the same footing as other vessels in the unsubsidized domestic fleet.

II

We are met at the outset with the contention that we lack jurisdiction to hear this case. Raised for the first time in a footnote to the federal parties' petition for rehearing in the Court of Appeals, the argument is that the District Court's November 30 judgment and order was not a "final decision" for purposes of 28 U. S. C. § 1291 because it remanded the case to the Secretary for consideration of the economic consequences of permitting the *Stuyvesant* to enter the Alaskan oil trade.[13] Respondents, the federal parties assert, sought but one form of relief—an order barring the *Stuyvesant* from competing with their own vessels. They advanced two

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would accordingly have little or no adverse effect on the respondents. *Id.*, at 568–569. Thereafter, Shell filed suit in the District Court challenging these findings. Its complaint was dismissed without prejudice following the decision of the Court of Appeals in the present case.

[12] *Id.*, at 558–559.

[13] Title 28 U. S. C. § 1291 states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

legal theories to support that prayer, one general—that the Secretary has no power to grant a permanent release from restrictions imposed pursuant to § 506—and the other particular—that even if the Secretary has the power to do so in some circumstances, the exercise of that power with regard to the *Stuyvesant* was an abuse of discretion. On remand, the federal parties continue, the Secretary might have concluded that the termination of § 506 restrictions was unwise. Alternatively, the Secretary might have decided to adhere to the original administrative decision and then been reversed by the courts. In either case, the federal parties argue, respondents would have obtained all the relief they sought. Accordingly, the District Court's November 30 order did not "'en[d] the litigation on the merits and leav[e] nothing for the court to do but execute the judgment,'" *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U. S. 229, 233 (1945), and thus was not a "final decision." As a result, the argument concludes, the November 30, 1977, order was not appealable to the Court of Appeals and this Court is therefore without jurisdiction to hear the case.

The difficulty with the federal parties' argument is that it misapprehends the nature of at least one of the complaints which commenced this litigation—that of Alaska Bulk Carriers, Inc., and Trinidad Corp.[14] Fairly read, that complaint seeks not only relief from competition from the *Stuyvesant*, but also a general declaration that the Secretary of Commerce is without power to permit *any* vessel constructed with the assistance of a CDS to enter the domestic trade under *any* circumstances save those narrow exceptions specifically mentioned in the statute itself. In this regard, the complaint alleged that the Secretary would in the future grant a *Stuyvesant*-like waiver to that vessel's sister ship, the *Bay Ridge*.[15] It stated that the

[14] The Alaska Bulk Carriers complaint is reproduced at App. 45–63.
[15] Complaint ¶¶ 33 and 42, App. 57, 61–62.

owners of unsubsidized vessels would be harmed by competition from the *Stuyvesant* "and from other CDS-built vessels with respect to which . . . the agency may likewise lift operating restrictions if this action is permitted to stand." [16] And its prayer for relief sought (1) declaratory and injunctive relief relating to the *Stuyvesant* itself, (2) a declaration that the Secretary lacks authority permanently to waive § 506 restrictions under any circumstances, (3) an injunction barring the Secretary from amending CDS contracts or taking any other action to lift § 506 restrictions, and (4) such other relief as the court deemed necessary.[17] There were, in short, two claims made and two quite different sorts of relief sought.[18]

In their reply brief, the federal parties attempt to answer the contention that respondents made two separate claims for relief by asserting that as to one of them—the request for a determination that the Secretary lacked power to grant a permanent release—the case-or-controversy requirement of Art. III of the Constitution has not been satisfied. Terming the question "abstract" and "hypothetical," the federal parties maintain that this claim was in effect a request for an advisory

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[16] *Id.*, ¶ 41, App. 61.

[17] *Id.*, at 62–63. The Shell complaint is reproduced *id.*, at 6–17. It focuses far more specifically on the *Stuyvesant*, and were it the only complaint before us there might be more force to the federal parties' characterization of this litigation as presenting a single claim supported by two theories. In that event, we would have had to explore some of the alternative bases of jurisdiction advanced by the respondents. The clear presence of two claims in the Alaska Bulk Carriers complaint makes such an inquiry unnecessary.

[18] The two are not, of course, unrelated. In particular, a favorable disposition of respondents' statutory claim would leave respondents with no reason to press the administrative one. The contrary proposition, however, is not true. The complaint strongly suggests that respondents would have pressed for resolution of their statutory claim even if the Secretary or the courts had concluded that under the circumstances existing at the time the administrative determination was made the *Stuyvesant* could not lawfully have been permitted to enter the Alaskan trade.

opinion, that it could not stand alone. We disagree. In our judgment, respondents' claim that the Merchant Marine Act does not permit the Secretary to grant a permanent release from § 506 restrictions satisfies the case-or-controversy requirement quite apart from the fate of the particular decision with respect to the *Stuyvesant*. First, there is at least one other vessel on the horizon as to which a similar waiver may well be sought and granted—the *Bay Ridge*. Built in the same yard for the same purpose, faced with a similar plight, and likely to have a similar effect on the Alaskan market if the same solution to that plight is sought, the *Bay Ridge* is a prime candidate for release from § 506 restrictions, and the prospect of its release is sufficient to create a live controversy. In this respect, the present case is very different from *Golden* v. *Zwickler*, 394 U. S. 103, 106–107, 109–110 (1969), on which the federal parties rely. Second, the Secretary's decision to grant a full release for the *Stuyvesant* is clear evidence of administrative willingness to grant such releases in appropriate cases if they are in fact lawful. Accordingly, there is nothing speculative about the assertion that, unless restrained or at least given the benefit of an authoritative ruling of law by this Court, the agency will grant such waivers in the future.[19] Compare *Steffel* v. *Thompson*, 415 U. S. 452, 459 (1974), and *id.*, at 476 (concurring opinion), with *O'Shea* v. *Littleton*, 414 U. S. 488, 493–498 (1974).[20] And third, the *Stuyvesant* itself contributes to the concrete controversy between respondents and the agency. As a practical matter, whether that vessel operates in the Alaskan trade is likely to depend almost entirely on the outcome of this litigation. And even were it determined on review of the remand decision that under the circumstances existing at the time a waiver was improper, both the *Stuyvesant* and the *Bay Ridge* would remain in the wings

[19] Prior administrative practice supports this conclusion as well. See *infra*, at 595.

[20] See also *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 152–154 (1967).

as likely prospects for future waivers if circumstances were to change. Accordingly, we conclude that the respondents' claim for relief respecting the general powers of the Secretary meets the case-or-controversy requirement of Art. III.

Having determined that there were two separate claims, each within the jurisdiction of the courts below, we need only note that the appeal from the District Court decision comported fully with Rule 54 (b) of the Federal Rules of Civil Procedure.[21] That Rule states in relevant part that "[w]hen more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." In the present case, more than one claim for relief was presented and the District Court found there was no reason for delay prior to directing the entry of final judgment as to one of the claims.[22] As a result, the determination that the Secretary was empowered to waive permanently the re-

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[21] We recognize that the District Court could not by purporting to comply with Rule 54 (b) render final for purposes of 28 U. S. C. § 1291 a decision that was in fact not final. *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U. S. 737, 742–743 (1976); *Sears, Roebuck & Co.* v. *Mackey*, 351 U. S. 427, 435 (1956). These cases make clear that Rule 54 (b) may properly be applied only to actions in which there has been a final decision on one or more but fewer than all the multiple claims raised. This condition is fully satisfied here, and the federal parties' reliance on *Liberty Mutual* is thus misplaced. There the District Court had made a determination of liability but had finally disposed of none of the original plaintiff's prayers for relief. Accordingly, Rule 54 (b) was not applicable. Here, one of the respondents' claims for relief was actually decided against them.

[22] App. 558–559. All parties proceeded as though the November 30 order were final. Indeed, even the federal parties initially appealed from that judgment, although that appeal was later dismissed on the federal parties' motion. Brief for Respondents Alaska Bulk Carriers, Inc., et al. 36, n. 26.

strictions required by § 506 was a final decision certifiable under Rule 54 (b) and appealable under 28 U. S. C. § 1291.

III

Prior to 1936, Congress assisted the American maritime industry in two ways: (1) it provided substantial low-interest loans to aid the construction of vessels destined for foreign trade, and (2) it appropriated large amounts of money for oceangoing mail contracts—amounts considerably in excess of actual cost and clearly intended as a subsidy for American shipping.[23] Neither effort was very successful. Loan repayment was difficult to secure, few ships were constructed, and the hidden mail subsidy proved unwieldy in addition to being somewhat disingenuous.[24]

In 1935, President Roosevelt proposed that Congress end the subterfuge and adopt a forthright and sensibly tailored program to subsidize and stimulate American shipping and shipbuilding. The result was the Merchant Marine Act, 1936. Its basic goals were set forth in § 101, 46 U. S. C. § 1101. There Congress declared it to be the policy of the United States "to foster the development and encourage the maintenance" of a large and effective merchant marine capable of meeting the Nation's future commercial and military needs. The fleet was to be modern and efficient. And Congress intended that it be supported by substantial shipbuilding and repair facilities.[25]

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[23] See H. R. Doc. No. 118, 74th Cong., 1st Sess., 1–3 (1935) (message from the President). In addition to these measures aimed at making it possible for American vessels to compete in foreign trade, of course, the Jones Act, 46 U. S. C. § 883, reserved the domestic trade for American vessels. See *supra*, at 574–575, and n. 1.

[24] H. R. Doc. No. 118, *supra*, at 3–19 (Report of the Postmaster General).

[25] Section 101, 49 Stat. 1985, as amended, provides in full as follows:

"It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine

The Secretary of Commerce was given broad authority to oversee administration of the Act. Thus, he was called upon to undertake a survey of the merchant marine, to note its needs, and to adopt a long-range program for meeting those needs. § 210, 46 U. S. C. § 1120. He was directed to investigate and keep current records of essential routes and lines to foreign ports, bulk-cargo carrying service requirements, needs for various types of vessels in various routes, construction and operating costs here and abroad, shipyard conditions, and new designs and technologies. § 211, 46 U. S. C. § 1121. He was authorized to devise means of encouraging use of American-flag vessels and improving those vessels in collaboration with vessel owners and shipbuilders. § 212, 46 U. S. C. § 1122. And he was empowered to "enter into such contracts, upon behalf of the United States, . . . as may, in . . . his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the [Federal Maritime] Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter." § 207, as set forth in 46 U. S. C. § 1117.

Central to the legislative scheme was the creation of an arsenal of grant and loan programs for use in the Secretary's efforts to stimulate domestic construction and make operation

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(a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine." 46 U. S. C. § 1101.

by domestic crews competitive. Included were an operating subsidy program, Title VI, 46 U. S. C. § 1171 *et seq.;* a program pursuant to which the Secretary could directly acquire new or reconditioned vessels and charter or sell them, Title VII, 46 U. S. C. § 1191 *et seq.;* a loan guarantee program, Title XI, 46 U. S. C. § 1271 *et seq.;* and the CDS program that lies at the core of the present litigation, Title V, 46 U. S. C. § 1151 *et seq.*[26] Again, the Secretary's discretion in administering these programs was substantial.

It was recognized from the outset that substantial limits would have to be placed upon the entry of subsidized vessels into the domestic trade.[27] Any other result would have been disastrous for the unsubsidized Jones Act fleet for which that trade was (and is) reserved. Burdened by higher construction costs, greater outstanding debt, and higher operating expenses,

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[26] The first section dealing with the CDS program, § 501, 46 U. S. C. § 1151, gives the Secretary considerable discretion to process, accept, and reject subsidy applications. Sections 502 and 504, 46 U. S. C. §§ 1152, 1154, authorize him to subsidize construction either by contracting directly with a shipyard for a vessel and then selling the completed ship to private parties at a cost corresponding to the cost of constructing a similar vessel abroad, or by contracting to pay only the appropriate CDS to the shipyard and letting the owner-operator remit the balance of the cost to the yard and take title directly. Those sections also set forth means of calculating foreign costs and subsidies, various limitations on such subsidies, terms of sale, and other requirements. Section 503, 46 U. S. C. § 1153, requires that subsidized vessels be documented under the laws of the United States and spells out various financial requirements. Section 505, 46 U. S. C. § 1155, requires that domestic shipyards and materials be used to construct subsidized vessels. And § 506, 46 U. S. C. § 1156, see n. 2, *supra*, contains the requirement that owners of subsidized vessels agree not to operate in domestic commerce except as specifically provided.

[27] H. R. Doc. No. 118, 74th Cong., 1st Sess., 22 (1935) (Report of the Interdepartmental Committee on Shipping Policy). See also H. R. Rep. No. 1277, 74th Cong., 1st Sess., 22 (1935) (describing 1935 version of the Act and noting that the Government may in certain circumstances consent to the operation of a subsidized vessel in the domestic trade "in which case the amount of the subsidy shall be repaid to the United States proportionately. . .").

that fleet would simply have been unable to compete with new vessels enjoying the benefits of the 1936 Act.

The congressional response to this problem as it relates to the CDS program was § 506.[28] Basically, that section confines subsidized vessels to the foreign trade. Congress recognized, however, that an entirely rigid prohibition on entry into domestic commerce might be impractical—incidental domestic operation on one segment of a voyage in foreign trade might well be efficient, and other circumstances might also arise in which some flexibility would be desirable. Accordingly, Congress permitted subsidized vessels to carry domestic cargoes on one leg of certain foreign voyages and provided in addition that the Secretary could authorize such vessels actually to enter the domestic trade for six months or less in any year upon finding that such entry would be "necessary or appropriate to carry out the purposes of this chapter." In an effort to ensure that subsidized vessels operating in domestic trade pursuant to these exceptions would compete on an equal footing with unsubsidized vessels similarly employed, Congress required the repayment of that portion of the outstanding subsidy allocable to the vessel's domestic activities.

The Court of Appeals was of the view that the specific exceptions in § 506 marked the limit of the Secretary's authority to approve entry of subsidized vessels into the domestic trade. By its logic, detail, and legislative history, the panel majority reasoned, that section prohibits transactions like the one before us. In consequence, that court found the broad sweep of the Secretary's power under the balance of the Act irrelevant, the express language giving the Secretary authority to make and amend contracts[29] unimportant, and the policy arguments advanced by the Secretary unpersuasive.

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[28] See n. 2, *supra*.

[29] See § 504 of the Act, 46 U. S. C. § 1154, and § 207, 46 U. S. C. § 1117. The former provision expressly authorizes the Secretary to make and amend CDS contracts.

We disagree. On the face of the statute, the Secretary's broad contracting powers and discretion to administer the Act seem to comprehend the authority urged by petitioners here. Indeed, as the Secretary found in the present case, a permanent release from the foreign-trade-only requirement may quite directly further the general goals of the Act by protecting the Government's position as guarantor of substantial financial obligations and improving the chances that a domestic shipyard will survive. Further, we are hard pressed to find anything in § 506 that suggests that the Secretary is forbidden to approve transactions of this sort under these circumstances. Certainly nothing in the language of that section so manacles the Secretary as to require the result reached below. Rather, § 506 simply mandates that vessels enjoying the benefits of a subsidy may move *in and out* of domestic commerce only under narrowly circumscribed conditions. It speaks to *temporary* releases from the foreign-trade-only requirement, and *only* to such releases. Moreover, for Congress to draft a section directed to the particular problems posed by temporary entry into the domestic trade was entirely logical since such releases pose problems not present in *permanent* releases of the sort at issue here. Specifically, a vessel with an outstanding CDS that was completely free to enter and depart the domestic trade would be in an extraordinarily favorable competitive situation even if it was required to repay a proportionate amount of its subsidy whenever it did so. Absent some restriction on its ability to move from one market to the other, it would be a formidable force in both, capable of taking advantage of every shift in trade and profitability, skimming the cream and leaving what remains to those less mobile. It could, in a very real sense, have the best of both worlds.[30]

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[30] The discussion in the text demonstrates that regardless of subsidy repayment there is considerable reason to restrict the extent to which subsidized vessels may enter and exit the domestic market. The need for limits is

Section 506 responds to this problem by permitting a vessel that enjoys the benefits of a CDS to operate outside the foreign market only in narrow circumstances, generally upon a highly discretionary administrative decision, and for no more than six months a year. And we have no doubt that it would be flatly inconsistent with the congressional intent were the Secretary or this Court to conclude that a *temporary* release not meeting these conditions was proper. But a *permanent* release upon full repayment is quite different. It irrevocably locates the vessel in the unsubsidized fleet and thus poses no danger of a supercompetitor skimming the cream from each market. It creates no long-term instability. And it confers no windfall. On the contrary, at least where repayment of the CDS includes some amount reflecting capital costs which would have been incurred had no subsidy been available,[31]

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heightened by the fact that proportionate subsidy repayment will generally fail to equalize the actual costs borne by owners of subsidized and unsubsidized vessels in domestic commerce. The problem is that the repayment formula in § 506 does not require the subsidized vessel to make any repayment to compensate for the interest it has not had to pay. To give a somewhat oversimplified example, compare two hypothetical vessels that operate for six months in domestic commerce, one unsubsidized and constructed with a $100 million, 10% loan, and the other subsidized and built with a $50 million CDS and a $50 million, 10% loan. During a given 6-month period the former vessel's interest will be $5 million (½ x 10% x $100 million). The latter will pay interest of $2.5 million (½ x 10% x $50 million) and a CDS repayment of $1.25 million (6/240 (months' useful life) x $50 million). In short, the subsidized vessel's expenses will be $1.25 million less, and its competitive posture all the more formidable. On the importance of interest in the permanent-release/full-repayment situation, see *infra*, this page, and n. 31.

[31] The need for some payment reflecting avoided capital costs was highlighted by Judge Bazelon's dissent to the opinion below. *Alaska Bulk Carriers, Inc.* v. *Kreps*, 194 U. S. App. D. C. 7, 36, n. 15, 595 F. 2d 814, 843, n. 15 (1979). In their brief, the federal parties represent that, while the Secretary originally concluded that no payment for interest would be required, the agency now intends to seek a reasonable amount of interest. Brief for Federal Parties 54, n. 59. Failure to do so might raise serious questions of inconsistency with the entire thrust of the Act.

such a transaction merely permits a once subsidized vessel to enter the domestic trade on a footing equal to that of vessels already in that trade. It was not the purpose of the Act to prohibit such entry, and we accordingly agree with the District Court that "*nothing* in section 506, [or] in any other provision of Title V, . . . either expressly or implicitly addresses the issue of *permanent* revocation of a CDS contract." 445 F. Supp., at 1135 (emphasis in original).

We turn now to the Court of Appeals' arguments concerning the legislative history of § 506. The panel majority was of the view that that history demonstrates that Congress addressed the problem before us and affirmatively decided not to permit the Secretary to approve transactions like the one at issue. We disagree. At most, we find the legislative history ambiguous, even puzzling. We do not find that it demonstrates that Congress has decided the present question.

We begin with the version of § 506 originally enacted as part of the 1936 Act. The first sentence of that version stated that it would be unlawful to operate any subsidized vessel other than exclusively in foreign trade or on incidental domestic portions of voyages in foreign trade, but provided that the Maritime Commission had authority to consent to operation that would otherwise be unlawful so long as the owner agreed to repay "an amount which bears the same proportion to the construction subsidy theretofore paid . . . as the remaining economic life of the vessel bears to its entire economic life." The second sentence provided that in cases of "emergency" the Commission could permit transfer of a subsidized vessel to "service other than exclusive operation in foreign trade" provided that no operating subsidy were paid during the emergency period and that period was limited to three months. And the third sentence specified that owners of a vessel operated on incidental domestic portions of voyages in foreign trade would have to make a proportionate subsidy repay-

ment.[32] It seems abundantly clear that this section provided for three different exceptions to the foreign-trade-only requirement: (1) subsidized vessels could also carry out incidental tasks in domestic trade (sentence one)—in which case consent of the Commission would not be required, but pro rata subsidy repayment would have to be made (sentence three), (2) such vessels could operate *permanently* in domestic trade

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[32] As originally enacted, Section 506, 49 Stat. 1999, provided in its entirety as follows:

"It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unless the owner of such vessel shall receive the written consent of the Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding cost of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: *Provided*, That no operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months. Every contractor receiving a contract for a construction-differential subsidy under the provisions of this title shall agree that if the subsidized vessel engages in domestic trade on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or loads or discharges cargo or passengers at an island possession or island territory as permitted by this section, that the contractor will repay annually to the Commission that proportion of one-twentieth of such construction subsidy as the gross revenue of such protected trade bears to the gross revenue derived from the entire voyages completed during the preceding year."

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upon the consent of the Commission and repayment of the unamortized portion of the subsidy (sentence one),[33] and (3) such vessels could, upon a Commission finding of emergency, enter domestic trade for up to three months without subsidy repayment (sentence two).

In 1938, § 506 was rewritten into substantially its present form. The objective consequences of that rewriting were, first, that all the language suggesting that a permanent release from trade restrictions upon full subsidy repayment would be appropriate was deleted and, second, that the provision authorizing a 3-month "emergency" release with no subsidy repayment was altered by eliminating the emergency requirement, changing the 3-month limit to 6 months and requiring proportionate subsidy repayment. In substance, the balance of the provision was left unchanged.

Respondents and the Court of Appeals contend that this rewriting embodied a considered congressional judgment that permanent release upon full repayment should not be permitted. They rely to a considerable extent upon the comments of Joseph P. Kennedy, Chairman of the Maritime

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[33] The Court of Appeals conceded that permanent domestic operation was permitted under this second exception, and respondents appear reluctantly to have followed suit. Further, as the Court of Appeals recognized, this reading is buttressed by the legislative history of the 1936 Act. See 194 U. S. App. D. C., at 19, n. 43, 595 F. 2d, at 826, n. 43 (citing legislative history). Moreover, the statute itself admits of no other interpretation. It provides for repayment of "an amount which bears the same proportion to the construction subsidy . . . as the remaining economic life of the vessel bears to its entire economic life." That amount necessarily would represent the entire portion of the subsidy allocable to the vessel's remaining life—for a new vessel it would constitute the entire subsidy, for a vessel halfway through its life, half the subsidy, etc. It is hardly conceivable that Congress would have intended repayment of the *entire* unamortized subsidy in exchange for only a temporary release from the foreign-trade-only requirement. Thus, only permanent release could have been contemplated.

Commission. During hearings on the measure he stated as follows:

> "Section 506 has been entirely rewritten to remove ambiguities and confusion. The section now provides that the owner can only engage in foreign trade exclusively with certain enumerated excepted services, for which services the owner is required to repay part of the construction-differential subsidy. There are also provisions which appear to give owners the right to engage in services other than the excepted ones, if the Commission consents to such use and the owner repays part of the construction-differential subsidy. Whether this right is restricted to the cases of emergency and to periods of 3 months as mentioned in the section, it is difficult to determine." [34]

The ambiguity referred to by Mr. Kennedy, the Court of Appeals concluded, was that hinted at in the final sentence of the quoted remarks—whether the "right to engage in services other than excepted ones" upon subsidy repayment was restricted to 3-month emergencies. And that ambiguity was resolved, the argument goes, by the decision to delete all language authorizing a permanent release and to rewrite the temporary release provision so that the "right" referred to by Mr. Kennedy could only be exercised for six months in any year. Accordingly, we are told, the intention of Congress to bar the transaction at issue here was "unmistakably manifested." 194 U. S. App. D. C., at 22, 595 F. 2d, at 829.

We find the contention that anything was unmistakable in these snippets of legislative history exceedingly curious. In the first place, it seems scarcely possible that Congress actually thought the original version ambiguous in the regard apparently referred to by Mr. Kennedy. As we have already

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[34] Amending Merchant Marine Act, 1936: Hearings on H. R. 8532 before the House Committee on Merchant Marine and Fisheries, 75th Cong., 2d and 3d Sess., 8 (1937–1938).

noted, no reading of that provision other than one permitting permanent waiver is possible given the mechanism set forth for calculation of the amount of subsidy repayment due.[35] Moreover, there is in fact no indication that Congress intended to make the major alterations claimed. Indeed, the House Report states that "[n]o fundamental change in the original purpose of the section has been effected," [36] and the Senate Report, while to some extent tracking Mr. Kennedy's comments, seems to identify the major change effected by the amendments as the addition of language making it "perfectly clear that unless the owner operates exclusively in foreign trade, he must repay a portion of the construction-differential subsidy for any service in which the vessel is engaged which includes domestic ports. . . ." [37] There is no language suggesting that Congress intended to rule out permanent releases of the type at issue here.[38]

We do not go so far as to assert with confidence that the deletion of the authorization contained in the second half of the first sentence of the 1936 version was inadvertent. Rather

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[35] See n. 23, *supra*.

[36] H. R. Rep. No. 2168, 75th Cong., 3d Sess., 21 (1938).

[37] S. Rep. No. 1618, 75th Cong., 3d Sess., 13 (1938). Similarly, the House Report stated that under the new version "the obligations of the owner to repay part of the subsidy are clearly defined." H. R. Rep. No. 2168, *supra*, at 21. Petitioners argue that such language supports the contention that the ambiguity actually troubling to Congress was whether proportional subsidy repayment would be required for temporary or incidental use in domestic trade and had nothing to do with the permanent-release issue.

[38] Interestingly, one of the spokesmen for unsubsidized carriers who testified during the Senate hearings suggested that Congress should substitute for the amendments to § 506 then under discussion a new section "prohibiting subsidized vessels and vessels which have at any time been subsidized, from the intercoastal service." Amending The Merchant Marine Act of 1936: Hearings on S. 3078 before the Senate Committee on Commerce and the Committee on Education and Labor, 75th Cong., 2d Sess., pt. 2, p. 44 (1937).

we are simply unsure of the precise significance of that deletion. What does seem clear is that it did not represent a considered congressional judgment that the permanent-release/full-repayment transaction before us should be prohibited.

IV

Our conclusion that Congress did not forbid the transactions here at issue is buttressed by two additional factors. First, the agency has consistently interpreted the Act to permit full-repayment/permanent-release arrangements.[39] Thus, in 1964 two vessels owned by Grace Line were permitted to repay the unamortized portion of subsidies in exchange for the removal of restrictions on their entry into domestic trade.[40] And in late 1976 and early 1977 two conditional requests for permanent release were granted to the owners of vessels employed in the Virgin Islands trade. The owners were concerned with the prospect that that trade might in the future be classified as domestic and were informed that they could obtain waivers if that eventuality were to occur.[41] While the agency's rationale has not always been entirely persuasive,[42] it has not wavered from its general understanding of its powers and the extent to which their exercise is consistent with the goals of the Act.

More importantly, in 1971 and 1972 Congress seems clearly to have contemplated transactions of the sort challenged here.

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[39] The relevant precedents are listed in Affidavit of James S. Dawson, Jr., Secretary of Maritime Administration, App. 164–166.

[40] Comptroller General Decision B–155039, 44 Comp. Gen. 180 (1964). The Court of Appeals sought to distinguish the Grace Line precedent on grounds the subsidies there were not used in initial construction of the vessels, but rather to convert them from cargo to container. We fail to see the relevance of this distinction.

[41] App. 165.

[42] See 194 U. S. App. D. C., at 35, 595 F. 2d, at 842 (dissenting opinion of Judge Bazelon criticizing administrative rationale in the Grace Line case).

In 1972, a new § 1104 (a)(3), 86 Stat. 911, 46 U. S. C. § 1274 (a)(3), was added to the Act. As originally proposed, the section provided that the agency could aid in financing repayment of "any amount of construction-differential subsidy paid with respect to a vessel pursuant to Title V of this Act . . . in order to release such vessel from all restrictions imposed as a result of the payment of [that] subsidy. . . ." [43] As enacted, the section did not include the language relating to release from all restrictions. The House Committee explained the deletion as follows:

> "In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language [relating to release from all restrictions]. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act." [44]

The understanding of the 92d Congress seems clear. And while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, *Teamsters* v. *United States*, 431 U. S. 324, 354, n. 39 (1977), such views are entitled to significant weight, *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 275 (1974), and particularly so when the precise intent of the enacting Congress is obscure.

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[43] H. R. 9756, 92d Cong., 1st Sess., § 3 (1971).

[44] H. R. Rep. No. 92-688, p. 10 (1971).

V

In conclusion, we hold that the Act empowers the Secretary to approve full-repayment/permanent-release transactions of the type at issue here. We express no view upon respondents' claim that if such authority exists under the Act full repayment may not be made by promissory note. This issue was not addressed by the Court of Appeals and is open for its consideration on remand. Further, we express no view upon the merits of the Secretary's particular exercise of discretion with regard to the *Stuyvesant* since that issue is not before us.

Reversed and remanded.

CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 78-1548. Argued November 27, 1979—Decided February 20, 1980

As an exception to the rule making it unlawful for an employer to engage in practices, procedures, or tests that operate to "freeze" the status quo of prior discriminatory employment practices, § 703 (h) of Title VII of the Civil Rights Act of 1964 provides that it shall not be an unlawful employment practice for an employer to apply different standards of compensation, terms, conditions, or privileges of employment pursuant to a bona fide seniority system if such differences are not the result of an intention to discriminate because of race. A multiemployer brewery industry collective-bargaining agreement accorded greater benefits, with respect to hiring and layoffs, to "permanent" than to "temporary" employees, and provided that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. Respondent Bryant (hereafter respondent), a Negro, brought a class action in District Court against petitioner association, petitioner employers, and several labor unions, alleging, *inter alia*, that the defendants had discriminated against him and other Negroes in violation of Title VII, and, in particular, that the agreement's 45-week requirement had operated to preclude him and the members of his class from achieving, or from a reasonable opportunity of achieving, permanent employee status. The District Court dismissed the complaint for failure to state a claim on which relief could be granted. The Court of Appeals reversed, holding that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h), and accordingly remanded the case to the District Court to enable respondent to prove that such requirement has had a discriminatory impact on Negroes.

Held: The Court of Appeals erred in holding that the 45-week requirement is not a component of a "seniority system" within the meaning of § 703 (h). The fact that the system created by the agreement establishes two parallel seniority ladders, one allocating benefits due temporary employees and the other identifying the benefits owed permanent employees, does not prevent it from being a "seniority system" within the meaning of § 703 (h). The 45-week requirement, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent employee seniority track. Cf. *Teamsters* v.

United States, 431 U. S. 324. Unlike such criteria as educational standards, aptitude or physical tests, or standards that give effect to subjectivity, but like any "seniority" rule, the 45-week requirement focuses on length of employment. Moreover, the requirement does not distort the operation of the basic system established by the agreement, which rewards employment longevity with heightened benefits, since, as a general rule, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement. Pp. 605–611.

585 F. 2d 421, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined, *post*, p. 611. POWELL and STEVENS, JJ., took no part in the consideration or decision of the case.

Willard Z. Carr, Jr., argued the cause for petitioners. With him on the briefs were *Michael D. Ryan*, *Aaron M. Peck*, *George Christensen*, *James R. Madison*, and *William F. Alderman*.

Roland P. Wilder, Jr., argued the cause for respondent unions as respondents under this Court's Rule 21 (4), urging reversal. With him on the briefs were *David Previant*, *George A. Pappy*, and *Robert D. Vogel*.

James Wolpman argued the cause for respondent Bryant. With him on the brief was *Michael P. Goldstein*.

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General McCree*, *Assistant Attorney General Days*, *Richard A. Allen*, *Leroy D. Clark*, *Joseph T. Eddins*, and *Beatrice Rosenberg*.*

**J. Albert Woll* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *Gerald A. Rosenberg*, *John B. Jones, Jr.*, *Norman Redlich*, *William L. Robinson*, and

MR. JUSTICE STEWART delivered the opinion of the Court.

Title VII of the Civil Rights Act of 1964 [1] makes unlawful, practices, procedures, or tests that "operate to 'freeze' the status quo of prior discriminatory employment practices." *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430. To this rule, § 703 (h) of the Act, 42 U. S. C. § 2000e–2 (h), provides an exception:

> "[I]t shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race. . . ."

In *Teamsters* v. *United States*, 431 U. S. 324, 352, the Court held that "the unmistakable purpose of § 703 (h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII . . . even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes." [2]

The present case concerns the application of § 703 (h) to a particular clause in a California brewery industry collective-bargaining agreement. That agreement accords greater benefits to "permanent" than to "temporary" employees, and the

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Richard T. Seymour for the Lawyers' Committee for Civil Rights Under Law; and by *Jack Greenberg, James M. Nabrit III, Barry L. Goldstein, O. Peter Sherwood, Daniel B. Edelman, Vilma S. Martinez,* and *Morris J. Baller* for the NAACP Legal Defense and Educational Fund, Inc., et al.

Bruce A. Nelson, Raymond L. Wheeler, Robert E. Williams, and *Douglas S. McDowell* filed a brief for the Equal Employment Advisory Council as *amicus curiae.*

[1] 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

[2] *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553, extended this holding to preclude Title VII challenges to seniority systems that perpetuated the effects of discriminatory post-Act practices that had not been the subject of a timely complaint. See also *Teamsters* v. *United States*, 431 U. S., at 348, n. 30.

clause in question provides that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee. The Court of Appeals for the Ninth Circuit held that the 45-week requirement was not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h). 585 F. 2d 421. We granted certiorari to consider the important question presented under Title VII of the Civil Rights Act of 1964. 442 U. S. 916.

I

In 1973, respondent Bryant (hereafter respondent), a Negro, filed a complaint in the United States District Court for the Northern District of California, on behalf of himself and other similarly situated Negroes, against the California Brewers Association and seven brewing companies (petitioners here), as well as against several unions. The complaint alleged that the defendants had discriminated against the respondent and other Negroes in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.*, and in violation of 42 U. S. C. § 1981.[3]

The complaint, as amended, alleged that the respondent had been intermittently employed since May 1968 as a temporary employee of one of the defendants, the Falstaff Brewing Corp. It charged that all the defendant employers had discriminated in the past against Negroes, that the unions had acted in concert with the employers in such discrimination, and that the unions had discriminated in referring applicants from hiring halls to the employers. The complaint further asserted that this historical discrimination was being perpetuated by the seniority and referral provisions of the collective-bargaining agreement (Agreement) that governed

[3] The complaint also alleged, under 29 U. S. C. §§ 159 and 185, that the union defendants had breached their duty of fair representation by, among other things, negotiating "unreasonable privileges for some employees over others. . . ."

industrial relations at the plants of the seven defendant employers. In particular, the complaint alleged, the Agreement's requirement that a temporary employee work 45 weeks in the industry in a single calendar year to reach permanent status had, as a practical matter, operated to preclude the respondent and the members of his putative class from achieving, or from a reasonable opportunity of achieving, permanent employee status.[4] Finally, the complaint alleged that on at least one occasion one of the defendant unions had passed over the respondent in favor of more junior white workers in making referrals to job vacancies at a plant of one of the defendant employers.

The Agreement is a multiemployer collective-bargaining agreement negotiated more than 20 years ago, and thereafter updated, by the California Brewers Association (on behalf of the petitioner brewing companies) and the Teamsters Brewery and Soft Drink Workers Joint Board of California (on behalf of the defendant unions). The Agreement establishes several classes of employees and the respective rights of each with respect to hiring and layoffs. Three of these classes are pertinent here: "permanent," "temporary," and "new" employees.

A permanent employee is "any employee . . . who . . . has completed forty-five weeks of employment under this Agreement in one classification [5] in one calendar year as an employee of the brewing industry in [the State of California]." An employee who acquires permanent status re-

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[4] In this Court, the respondent emphasizes that he has not contended that there is anything illegal in classifying employees as permanent and temporary or in according greater rights to permanent than to temporary employees. His sole Title VII challenge in this respect has been to the 45-week rule on its face and as it has been applied by the defendant unions and employers.

[5] The Agreement classifies employees into brewers, bottlers, drivers, shipping and receiving clerks, and checkers. Under the Agreement, separate seniority lists have to be maintained for each of these classifications of employees. The respondent is a brewer.

tains that status unless he "is not employed under this Agreement for any consecutive period of two (2) years. . . ."[6] A temporary employee under the Agreement is "any person other than a permanent employee . . . who worked under this agreement . . . in the preceding calendar year for at least sixty (60) working days. . . ." A new employee is any employee who is not a permanent or temporary employee.

The rights of employees with respect to hiring and layoffs depend in substantial part on their status as permanent, temporary, or new employees.[7] The Agreement requires that employees at a particular plant be laid off in the following order: new employees in reverse order of their seniority at the plant, temporary employees in reverse order of their plant seniority, and then permanent employees in reverse order of their plant seniority. Once laid off, employees are to be rehired in the reverse order from which they were laid off.

The Agreement also gives permanent employees special "bumping" rights. If a permanent employee is laid off at any plant subject to the Agreement, he may be dispatched by the union hiring hall to any other plant in the same local area with the right to replace the temporary or new employee with the lowest plant seniority at that plant.

Finally, the Agreement provides that each employer shall obtain employees through the local union hiring hall to fill needed vacancies. The hiring hall must dispatch laid-off workers to such an employer in the following order: first, employees of that employer in the order of their seniority with that employer; second, permanent employees registered in the area in order of their industry seniority; third, temporary employees in the order of their seniority in the industry; and

[6] An employee may also lose permanent status if he "quits the industry" or is discharged for certain specified reasons.

[7] In addition, permanent employees are given preference over temporary employees with respect to various other employment matters, such as the right to collect supplemental unemployment benefits upon layoff, wages and vacation pay, and choice of vacation times.

fourth, new employees in the order of their industry seniority. The employer then "shall have full right of selection among" such employees.

The District Court granted the defendants' motions to dismiss the complaint for failure to state a claim on which relief could be granted. No opinion accompanied this order. A divided panel of the Court of Appeals reversed, 585 F. 2d 421, concluding that the 45-week rule is not a "seniority system" or part of a "seniority system" within the meaning of § 703 (h) of Title VII. In the appellate court's view the provision "lacks the fundamental component of such a system" which is "the concept that employment rights should increase as the length of an employee's service increases." 585 F. 2d, at 426. The court pointed out that under the Agreement some employees in the industry could acquire permanent status after a total of only 45 weeks of work if those weeks were served in one calendar year, while others "could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year." *Id.*, at 426–427.

The Court of Appeals concluded that "while the collective bargaining agreement does contain a seniority system, the 45-week provision is not a part of it." *Id.*, at 427:

> "The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e. g.*, an academic degree requirement) or classification device (*e. g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line." *Id.*, at 427, n. 11.[8]

[8] The Court of Appeals also observed that "the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from

Accordingly, the Court of Appeals remanded the case to the District Court to enable the respondent to prove that the 45-week provision has had a discriminatory impact on Negroes under the standards enunciated in *Griggs* v. *Duke Power Co.*, 401 U. S. 424. 585 F. 2d, at 427–428.[9]

II

Title VII does not define the term "seniority system," and no comprehensive definition of the phrase emerges from the legislative history of § 703 (h).[10] Moreover, our cases have not purported to delineate the contours of its meaning.[11] It is appropriate, therefore, to begin with commonly accepted notions about "seniority" in industrial relations, and to consider those concepts in the context of Title VII and this country's labor policy.

In the area of labor relations, "seniority" is a term that connotes length of employment.[12] A "seniority system" is a

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ever achieving permanent status." 585 F. 2d, at 427. This danger, according to the court, is almost never present in any "true" seniority system, in which rights "usually accumulate automatically over time. . . ." *Ibid.*

[9] The Court of Appeals directed the trial court on remand to consider as well the respondent's claims under 42 U. S. C. § 1981 and 29 U. S. C. §§ 159 and 185.

[10] See 110 Cong. Rec. 1518, 5423, 7207, 7213, 7217, 12723, 15893 (1964). The example of a "seniority system" most frequently cited in the congressional debates was one that provided that the "last hired" employee would be the "first fired." Nowhere in the debates, however, is there any suggestion that this model was intended to be anything other than an illustration.

[11] See *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63; *United Air Lines, Inc.* v. *Evans*, 431 U. S. 553; *Teamsters* v. *United States*, 431 U. S. 324; *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747.

[12] Webster's Third New International Dictionary 2066 (unabridged ed. 1961) defines "seniority," in pertinent part, as the "status attained by length of continuous service . . . to which are attached by custom or prior collective agreement various rights or privileges . . . on the basis of ranking relative to others. . . ."

scheme that, alone or in tandem with non-"seniority" criteria,[13] allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase.[14] Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

Viewed as a whole, most of the relevant provisions of the Agreement before us in this case conform to these core concepts of "seniority." Rights of temporary employees and rights of permanent employees are determined according to length of plant employment in some respects, and according to length of industry employment in other respects. Notwithstanding this fact, the Court of Appeals concluded that the 45-week rule should not be viewed, for purposes of § 703 (h), as part of what might otherwise be considered a "seniority system." For the reasons that follow, we hold that this conclusion was incorrect.

First, by legislating with respect to "systems" [15] of seniority

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[13] A collective-bargaining agreement could, for instance, provide that transfers and promotions are to be determined by a mix of seniority and other factors, such as aptitude tests and height requirements. That the "seniority" aspects of such a scheme of transfer and promotion might be covered by § 703 (h) does not mean that the aptitude tests or the height requirements would also be so covered.

[14] See E. Beal, E. Wickersham, & P. Kienast, The Practice of Collective Bargaining 430–431 (1972); Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969); Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962).

[15] Webster's Third New International Dictionary 2322 (unabridged ed. 1961) defines "system," in pertinent part, as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose."

in § 703 (h), Congress in 1964 quite evidently intended to exempt from the normal operation of Title VII more than simply those components of any particular seniority scheme that, viewed in isolation, embody or effectuate the principle that length of employment will be rewarded. In order for any seniority system to operate at all, it has to contain ancillary rules that accomplish certain necessary functions, but which may not themselves be directly related to length of employment.[16] For instance, every seniority system must include rules that delineate how and when the seniority time-clock begins ticking,[17] as well as rules that specify how and when a particular person's seniority may be forfeited.[18] Every seniority system must also have rules that define which passages of time will "count" towards the accrual of seniority and which will not.[19] Every seniority system must, moreover, contain rules that particularize the types of employment conditions that will be governed or influenced by seniority, and those that will not.[20] Rules that serve these necessary pur-

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[16] See generally S. Slichter, J. Healy, & E. Livernash, The Impact of Collective Bargaining on Management 115–135 (1960).

[17] By way of example, a collective-bargaining agreement could specify that an employee begins to accumulate seniority rights at the time he commences employment with the company, at the time he commences employment within the industry, at the time he begins performing a particular job function, or only after a probationary period of employment.

[18] For example, a collective-bargaining agreement could provide that accumulated seniority rights are permanently forfeited by voluntary resignation, by severance for cause, or by nonemployment at a particular plant or in the industry for a certain period.

[19] For instance, the time an employee works in the industry or with his current employer might not be counted for the purpose of accumulating seniority rights, whereas the time the employee works in a particular job classification might determine his seniority.

[20] By way of example, a collective-bargaining agreement could provide that an employee's seniority will govern his entitlement to vacation time and his job security in the event of layoffs, but will have no influence on promotions or job assignments.

poses do not fall outside § 703 (h) simply because they do not, in and of themselves, operate on the basis of some factor involving the passage of time.[21]

Second, Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers* v. *Weber*, 443 U. S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.* v. *NLRB*, 397 U. S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co.* v. *Huffman*, 345 U. S. 330; *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521. As we made clear in the *Teamsters* case, seniority may be "measured in a number of ways" and the legislative history of § 703 (h) does not suggest that it was enacted to prefer any particular variety of seniority system over any other. 431 U. S., at 355, n. 41.

What has been said does not mean that § 703 (h) is to be given a scope that risks swallowing up Title VII's otherwise broad prohibition of "practices, procedures, or tests" that disproportionately affect members of those groups that the Act protects. Significant freedom must be afforded employers and unions to create differing seniority systems. But that freedom must not be allowed to sweep within the ambit of § 703 (h) employment rules that depart fundamentally from commonly accepted notions concerning the acceptable contours of a seniority system, simply because those rules are dubbed "seniority" provisions or have some nexus to an arrangement that concededly operates on the basis of seniority.

[21] The examples in the text of the types of rules necessary to the operation of a seniority system are not intended to and do not comprise an exhaustive list.

There can be no doubt, for instance, that a threshold requirement for entering a seniority track that took the form of an educational prerequisite would not be part of a "seniority system" within the intendment of § 703 (h).

The application of these principles to the case at hand is straightforward. The Agreement sets out, in relevant part, two parallel seniority ladders. One allocates the benefits due temporary employees; the other identifies the benefits owed permanent employees. The propriety under § 703 (h) of such parallel seniority tracks cannot be doubted after the Court's decision in the *Teamsters* case. The collective-bargaining agreement at issue there allotted one set of benefits according to each employee's total service with the company, and another set according to each employee's service in a particular job category. Just as in that case the separation of seniority tracks did not derogate from the identification of the provisions as a "seniority system" under § 703 (h), so in the present case the fact that the system created by the Agreement establishes two or more seniority ladders does not prevent it from being a "seniority system" within the meaning of that section.

The 45-week rule, correspondingly, serves the needed function of establishing the threshold requirement for entry into the permanent-employee seniority track. As such, it performs the same function as did the employment rule in *Teamsters* that provided that a line driver began to accrue seniority for certain purposes only when he started to work as a line driver, even though he had previously spent years as a city driver for the same employer. In *Teamsters*, the Court expressed no reservation about the propriety of such a threshold rule for § 703 (h) purposes. There is no reason why the 45-week threshold requirement at issue here should be considered any differently.

The 45-week rule does not depart significantly from commonly accepted concepts of "seniority." The rule is not an educational standard, an aptitude or physical test, or a stand-

ard that gives effect to subjectivity. Unlike such criteria, but like any "seniority" rule, the 45-week requirement focuses on length of employment.

Moreover, the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits. A temporary employee's chances of achieving permanent status increase inevitably as his industry employment and seniority accumulate. The temporary employees with the most industry seniority have the first choice of new jobs within the industry available for temporary employees. Similarly, the temporary employees with the most plant seniority have the first choice of temporary employee jobs within their plant and enjoy the greatest security against "bumping" by permanent employees from nearby plants. As a general rule, therefore, the more seniority a temporary employee accumulates, the more likely it is that he will be able to satisfy the 45-week requirement. That the correlation between accumulated industry employment and acquisition of permanent employee status is imperfect does not mean that the 45-week requirement is not a component of the Agreement's seniority system. Under any seniority system, contingencies such as illnesses and layoffs may interrupt the accrual of seniority and delay realization of the advantages dependent upon it.[22]

For these reasons, we conclude that the Court of Appeals was in error in holding that the 45-week rule is not a component of a "seniority system" within the meaning of § 703 (h) of Title VII of the Civil Rights Act of 1964. In the District Court the respondent will remain free to show that, in respect to the 45-week rule or in other respects, the se-

[22] There are indications in the record of this case that a long-term decline in the California brewing industry's demand for labor is a reason why the accrual of seniority as a temporary employee has not led more automatically to the acquisition of permanent status. But surely, what would be part of a "seniority system" in an expanding labor market does not become something else in a declining labor market.

niority system established by the Agreement is not "bona fide," or that the differences in employment conditions that it has produced are "the result of an intention to discriminate because of race."

For the reasons stated, the judgment before us is vacated, and the case is remanded to the Court of Appeals for the Ninth Circuit for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of this case.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN join, dissenting.

In the California brewing industry, an employee's rights and benefits are largely dependent on whether he is a "permanent" employee within the meaning of the collective-bargaining agreement. Permanent employees are laid off after all other employees. If laid off at one facility, a permanent employee is permitted to replace the least senior nonpermanent employee at any other covered facility within the local area. Permanent employees are selected before temporary employees to fill vacancies. They have exclusive rights to supplemental unemployment benefits upon layoff and receive higher wages and vacation pay for the same work performed by other employees. Permanent employees have first choice of vacation times, less rigorous requirements for qualifying for holiday pay, exclusive access to veterans' reinstatement and seniority rights, and priority in assignment of overtime work among bottlers.

According to respondent Bryant's complaint, no Negro has ever attained permanent employee status in the California brewing industry.[1]

[1] In the present procedural posture of the case, of course, the allegations of the complaint must be accepted as true.

The provision of the collective-bargaining agreement at issue here defines a permanent employee as one "who . . . has completed forty-five weeks of employment . . . in one classification in one calendar year as an employee of the brewing industry in this State." An employee who works 44 weeks per year for his entire working life remains a temporary employee. By contrast, an employee who works 45 weeks in his first year in the industry attains permanent employee status. This simple fact belies the Court's conclusion that the 45-week requirement "does not depart significantly from commonly accepted concepts of 'seniority.'" *Ante*, at 609. Since I am unable to agree that the provision at issue is part of a "seniority system" under § 703 (h) of Title VII, I dissent.

I

Neither Title VII nor its legislative history provides a comprehensive definition of the term "seniority system."[2] The Court is therefore correct in concluding that the term must be defined by reference to "commonly accepted notions about 'seniority' in industrial relations" and "in the context of Title VII and this country's labor policy." *Ante*, at 605. Those "commonly accepted notions," however, do not lead to the Court's holding today. And I believe that the relevant policies do not support that holding, but instead require that it be rejected.

The concept of "seniority" is not a complicated one. The fundamental principle, as the Court recognizes, *ante*, at 606, is that employee rights and benefits increase with length of service. This principle is reflected in the very definition of the term, as found in dictionaries[3] and treatises and articles in

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[2] The legislative history does, however, provide a bit more guidance than the Court admits. The fact that the sole example of a seniority system given in the congressional debates is one in which rights increase with cumulative length of service is at least suggestive. See *ante*, at 605, n. 10.

[3] See, *e. g.*, Webster's Third New International Dictionary 2066 (unabridged ed. 1961) ("a status attained by length of continuous service

the field of industrial relations.[4] To quote from a few of the sources on which the Court purports to rely today: "Seniority is a system of employment preference based on length of serv-

(as in a company . . .) to which are attached by custom or prior collective agreement various rights or privileges"); Random House Dictionary of the English Language 1299 (1966) ("priority, precedence, or status obtained as the result of a person's length of service"); Black's Law Dictionary 1222 (5th ed. 1979) ("As used with reference to job seniority, worker with most years of service is first promoted within range of jobs subject to seniority, and is the last laid off, proceeding so on down the line to the youngest in point of service"); Ballentine's Law Dictionary 1160 (1969) ("the principle in labor relations that length of employment determines the order of layoffs, rehirings, and advancements").

[4] See, *e. g.*, Roberts' Dictionary of Industrial Relations 390 (1966) ("The length of service an individual employee has in the plant. . . . The seniority principle rests on the assumption that the individuals with the greatest length of service within the company should be given preference in employment"); United States Department of Labor, Bureau of Labor Statistics, Bulletin No. 908–11, p. 1 (1949) ("A seniority program aims to provide maximum security in employment to those with the longest service"); E. Dangel & I. Shriber, The Law of Labor Unions § 15 (1941) ("Seniority . . . is an employment advantage in the matter of the choice of and the right to work in one's occupation on the basis of an employee's length of service"); BNA, Collective Bargaining Contracts, Techniques of Negotiation and Administration with Topical Classification of Clauses 488 (1941) ("The term [seniority] refers to length of service with the employer or in some division of an enterprise"); Meyers, The Analytic Meaning of Seniority, Industrial Relations Research Association, Proceedings of Eighteenth Annual Meeting 194 (1966) ("Seniority is the application of the criterion of length of service for the calculation of relative equities among employees"); McCaffrey, Development and Administration of Seniority Provisions, Proceedings of New York University Second Annual Conference on Labor 132 (1949) ("seniority may be defined as the length of company-recognized service as applied to certain employer-employee relationships"); Christenson, Seniority Rights Under Labor Union Working Agreements, 11 Temp. L. Q. 355 (1937) ("seniority is a rule providing that employers promote, lay-off and re-employ labor, according to length of previous service"). Cf. P. Selznick, Law, Society, and Industrial Justice 203 (1969) (referring to the "'rather general feeling that a worker who has spent many years on his job has some stake in that job and in the business of which it is a part'").

ice; employees with the longest service are given the greatest job security and the best opportunities for advancement." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1534 (1962). "The variations and combinations of seniority principles are very great, but in all cases the basic measure is length of service, with preference accorded to the senior worker." Cooper & Sobol, Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1602 (1969). "Seniority grants certain preferential treatment to long-service employees almost at the expense of short-service employees. . . . [S]eniority is defined as length of service." E. Beal, E. Wickersham, & P. Kienast, The Practice of Collective Bargaining 430 (1972).

It is hardly surprising that seniority has uniformly been defined in terms of cumulative length of service. No other definition could accord with the policies underlying the recognition of seniority rights. A seniority system provides an objective standard by which to ascertain employee rights and protections, thus reducing the likelihood of arbitrariness or caprice in employer decisions. At the same time, it promotes stability and certainty among employees, furnishing a predictable method by which to measure future employment position. See, *e. g.*, Sayles, Seniority: An Internal Union Problem, 30 Harv. Bus. Rev. 55 (1952); C. Golden & H. Ruttenberg, The Dynamics of Industrial Democracy 128–131 (1973); Cooper & Sobol, *supra*, at 1604–1605.

The Court concedes this general point, recognizing that a " 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *Ante*, at 605–606 (footnote omitted). In my view, that concession is dispositive of this case. The principal effect of the 45-week requirement is to ensure that employee rights and benefits in the California

brewing industry are not "ever improving" as length of service increases. Indeed, cumulative length of service is only incidentally relevant to the 45-week rule. The likelihood that a temporary employee will attain permanent employee status is largely unpredictable. The 45-week period, which is exclusive of vacation, leaves of absence, and time lost because of injury or sickness, represents almost 90% of the calendar year. Even if an employee is relatively senior among temporaries, his ability to work 45 weeks in a year will rest in large part on fortuities over which he has no control. The most obvious reason that employees have been prevented from attaining permanent employee status—a reason barely referred to by the Court—is that the brewing industry is a seasonal one. An employee may also be prevented from becoming permanent because of replacement by permanent employees or an employer's unexpected decision to lay off a particular number of employees during the course of a year.[5] It is no wonder that the accrual of seniority by temporary employees has not led with any regularity to the acquisition of permanent employee status.[6] In sum, the 45-week rule does not have

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[5] Indeed, the agreement expressly provides that a permanent employee laid off at one facility will replace (or "bump") the temporary employee with the lowest *plant* seniority, even if that employee has more industry seniority than others. As a result, temporaries who are relatively senior in terms of industry seniority may have less opportunity to work 45 weeks in a calendar year than temporaries with less industry seniority but more plant seniority. Thus, it is simply not true that temporary employees obtain permanent employee status in order of cumulative length of employment, for the requisite 45 weeks is computed on the basis of service in the industry rather than in particular plants.

[6] The Court acknowledges this point, *ante*, at 610, n. 22, but responds that a system which would fall within § 703 (h) in an expanding labor market does not lose that status by virtue of the fact that the labor market is contracting. In the Court's words, however, the question is whether the 45-week rule is a part of a seniority system because it "allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." In that context it is

the feature of providing employees with a reasonably certain route by which to measure future employment position. So understood, the 45-week rule has very little to do with seniority, for it makes permanent status turn on fortuities over which the employee has no control, not on length of service with the employer or in the relevant unit.

The Court avoids this conclusion by little more than assertion. It observes that the 45-week rule acts as a threshold requirement for entry onto the seniority track composed of permanent employees, but eliminates the force of that observation with the inevitable concession that such threshold requirements are not necessarily entitled to § 703 (h) exemption.[7] It notes that the 45-week requirement "focuses on length of employment," and proceeds to the unexplained conclusion that it therefore "does not depart significantly from commonly accepted concepts of 'seniority.'" And it adds that more senior temporary employees tend to have a greater opportunity to obtain work and thus to attain permanent status through 45 weeks of employment in a calendar year.

The Court's analysis, of course, is largely dependent on its conclusion that since the 45-week requirement is one measured by time of service, it does not depart from common concepts of seniority. That conclusion, however, is foreclosed by the Court's own definition of a seniority system as one in which employee rights increase with cumulative length of

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surely relevant whether the 45-week provision does in fact operate to reward cumulative length of service, or serves instead as a virtually impassable barrier to advancement.

[7] As the Court's own analysis suggests, the 45-week provision is entirely different from the seniority provisions involved in *Teamsters* v. *United States*, 431 U. S. 324 (1977). At issue in that case was a seniority system granting some benefits on the basis of an employee's cumulative length of service with the company, and others on the basis of cumulative length of service in a particular job category. In both cases employee rights and benefits depended on total length of service in the relevant unit, not on the length of service within a calendar year.

service—not length of service within a calendar year. The mere fact that the 45-week rule is in some sense a measure of "time" does not demonstrate a valid relation to concepts of seniority. Such a conclusion would make the § 703 (h) exemption applicable to a rule under which permanent employee status is dependent on number of days served within a week, or hours served within a day.[8]

Nor is there much force to the suggestion that the 45-week requirement somehow becomes part of a seniority system because permanent employee status is more easily achieved by the more senior temporary employees. I could agree with the Court's decision if petitioners demonstrated that the collective-bargaining agreement actually operates to reward employees in order of cumulative length of service. But at this stage of the litigation there is no evidence that temporary employees attain permanent status in a way correlating even roughly with total length of employment. The mere possibility that senior temporary employees are more likely to work for 45 weeks is, in my view, insufficient.[9] It might as well be said that a law conditioning permanent employee status on the attainment of a certain level of skill is a "seniority" provision since skills tend to increase with length of service. A temporary employee is always subject to a risk that for some reason

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[8] For example, there can be no serious question that a provision making permanent status dependent on 7 days of work per week, or 12 hours per day, would not be part of a "seniority system" within the meaning of § 703 (h).

[9] I could understand, although I do not favor, a decision remanding this case for factual findings on the question whether temporary employees in fact acquire permanent status and, if so, whether they do so in order of cumulative length of service. In my view, it is extraordinary for the Court to conclude, in a factual vacuum and on the authority of nothing other than petitioners' word, that "the rule does not distort the operation of the basic system established by the Agreement, which rewards employment longevity with heightened benefits." See also n. 5, *supra*.

beyond his control, he will be unable to work the full 45 weeks and be forced to start over again.

II

Since the 45-week rule operates as a threshold requirement with no relation to principles of seniority, I believe that the rule is for analytical purposes no different from an educational standard or physical test which, as the Court indicates, is plainly not entitled to § 703 (h) exemption. Accordingly, I think it clear that the 45-week requirement is not part of a "seniority system" within the meaning of § 703 (h). But if the question were perceived to be close, I would be guided by the familiar principle that exemptions to remedial statutes should be construed narrowly. "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *Phillips Co.* v. *Walling*, 324 U. S. 490, 493 (1945). See, *e. g.*, *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U. S. 205, 231 (1979); *Abbott Laboratories* v. *Portland Retail Druggists Assn.*, 425 U. S. 1, 12 (1976); *Peyton* v. *Rowe*, 391 U. S. 54, 65 (1968). The effect of § 703 (h) is to exempt seniority systems from the general prohibition on practices which perpetuate the effects of racial discrimination. This exception is a limited one in derogation of the overarching purpose of Title VII, "the integration of blacks into the mainstream of American society," *Steelworkers* v. *Weber*, 443 U. S. 193, 202 (1979). A statute designed to remedy the national disgrace of discrimination in employment should be interpreted generously to comport with its primary purpose; exemptions should be construed narrowly so as not to undermine the effect of the general prohibition. Today the Court not only refuses to apply this familiar principle of statutory construction, it does not even acknowledge it.

In my view, the Court's holding is fundamentally at odds with the purposes of Title VII and the basic function of the § 703 (h) exemption. I dissent.[10]

[10] To decide this case we are not required to offer a complete definition of the term "seniority system" within the meaning of § 703 (h). Nor are we called upon to canvass and evaluate rules "ancillary" to seniority systems. The question whether all of the rules listed by the Court, *ante*, at 607, nn. 17–20, are part of a seniority system is not at all easy, and the Court's own reasoning demonstrates that its discussion of those rules is gratuitous and does little to advance analysis of the 45-week requirement. That requirement serves none of the functions of an "ancillary" rule.

VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 78-1335. Argued October 30, 1979—Decided February 20, 1980

Petitioner village has an ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," such purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. After petitioner denied respondent Citizens for a Better Environment (CBE) (a nonprofit environmental-protection organization) a solicitation permit because it could not meet the ordinance's 75-percent requirement, CBE sued petitioner in Federal District Court, alleging that such requirement violated the First and Fourteenth Amendments, and seeking declaratory and injunctive relief. The District Court granted summary judgment for CBE. The Court of Appeals affirmed, rejecting petitioner's argument that summary judgment was inappropriate because there was an unresolved factual dispute as to the true character of CBE's organization, and holding that since CBE challenged the facial validity of the ordinance on First Amendment grounds the facts as to CBE's internal affairs and operations were immaterial and therefore not an obstacle to the granting of summary judgment. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even where the contributions would be used for reasonable salaries of those who gathered and disseminated information relevant to the organization's purpose.

Held: The ordinance in question is unconstitutionally overbroad in violation of the First and Fourteenth Amendments. Pp. 628-639.

(a) Charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, dissemination and propagation of views and ideas, and advocacy of causes—that are within the First Amendment's protection. While soliciting financial support is subject to reasonable regulation, such regulation must give due regard to the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on eco-

nomic, political, or social issues, and to the reality that without solicitation the flow of such information and advocacy would likely cease. Moreover, since charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it is not dealt with as a variety of purely commercial speech. Pp. 628–632.

(b) The Court of Appeals was free to inquire whether the ordinance was overbroad, a question of law that involved no dispute about CBE's characteristics, and thus properly proceeded to rule on the merits of the summary judgment. CBE was entitled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations. Pp. 633–635.

(c) The 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that petitioner is entitled to protect. Here, petitioner's proffered justifications that such limitation is intimately related to substantial governmental interests in preventing fraud and protecting public safety and residential privacy are inadequate, and such interests could be sufficiently served by measures less destructive of First Amendment interests. Pp. 635–639.

590 F. 2d 220, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 639.

Jack M. Siegel argued the cause and filed briefs for petitioner.

Milton I. Shadur argued the cause for respondents. With him on the brief were *Geraldine Soat Brown* and *David Goldberger*.

Adam Yarmolinsky argued the cause and filed a brief for the Coalition of National Voluntary Organizations et al. as *amici curiae* urging affirmance.*

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*Briefs of *amici curiae* urging affirmance were filed by *J. Albert Woll* and *Laurence Gold* for the American Federation of Labor and Congress of

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the validity under the First and Fourteenth Amendments of a municipal ordinance prohibiting the solicitation of contributions by charitable organizations that do not use at least 75 percent of their receipts for "charitable purposes," those purposes being defined to exclude solicitation expenses, salaries, overhead, and other administrative expenses. The Court of Appeals held the ordinance unconstitutional. We affirm that judgment.

I

The Village of Schaumburg (Village) is a suburban community located 25 miles northwest of Chicago, Ill. On March 12, 1974, the Village adopted "An Ordinance Regulating Soliciting by Charitable Organizations," codified as Art. III of Chapter 22 of the Schaumburg Village Code (Code), which regulates the activities of "peddlers and solicitors," Code § 22–1 *et seq.* (1975).[1] Article III[2] provides that

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Industrial Organizations; by *Barry A. Fisher* for the Holy Spirit Association for the Unification of World Christianity; by *Arnold H. Gold* for the Los Angeles Council of National Voluntary Health Agencies; by *Alan B. Morrison* for the National Committee for Responsive Philanthropy et al.; and by *Sanford Jay Rosen* for the National Council of Churches of Christ in the U. S. A. et al.

[1] Article II of Chapter 22 regulates commercial solicitation by requiring "for profit peddlers and solicitors" to obtain a commercial license. For the purposes of Art. II, peddlers and solicitors are defined as any persons who, going from place to place without appointment, offer goods or services for sale or take orders for future delivery of goods or services. Code § 22–6. Section 22–7 requires any person "engage[d] in the business of a peddler or solicitor within the village" to obtain a license. Licenses can be obtained by application to the village collector and payment of an annual fee ranging from $10 to $25. License applications must contain a variety of information, including the kind of merchandise to be offered, the address of the applicant, the name of the applicant's employer, and whether the applicant has ever been arrested for a misdemeanor or felony.

[*Footnote 2 is on p. 623*]

"[e]very charitable organization, which solicits or intends to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways, shall prior to such solicitation apply for a permit." § 22–20.[3]

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§ 22–8. A license must be denied to anyone "who is not found to be a person of good character and reputation." § 22–9.

Solicitation is permitted between the hours of 9 a. m. and 6 p. m., Monday through Saturday. § 22–13. Cheating, deception, or fraudulent misrepresentation by peddlers or solicitors is prohibited by § 22–12. Peddlers and solicitors are required to depart "immediately and peacefully" from the premises of any home displaying a sign, "No Solicitors or Peddlers Invited," near the main entrance. §§ 22–15 and 22–16.

Persons violating the provisions of Art. II may be fined up to $500 for each offense. § 22–18. The village manager may revoke the license of any peddler or solicitor who violates any village ordinance or any state or federal law or who ceases to possess good character. § 22–11.

[2] Article III of Chapter 22 includes §§ 22–19 to 22–24 of the Code. Section 22–19 defines a "charitable organization" as "[a]ny benevolent, philanthropic, patriotic, not-for-profit, or eleemosynary group, association or corporation, or such organization purporting to be such, which solicits and collects funds for charitable purposes." A "charitable purpose" is defined as "[a]ny charitable, benevolent, philanthropic, patriotic, or eleemosynary purpose." A "contribution" is defined as "[t]he promise or grant of any money or property of any kind or value, including payments for literature in excess of the fair market value of said literature."

[3] Applications for charitable solicitation permits must include the following information: the names and addresses of the persons and organizations involved, the dates and times solicitation is to be undertaken, the geographic area in which solicitation will occur, and proof that the organization has complied with state laws governing charitable solicitation and is tax exempt under the Internal Revenue Code. The information contained in permit applications must be verified under oath by a responsible officer of the organization desiring to solicit funds. Completed applications, which must be accompanied by payment of a $10 fee, are submitted by the village clerk to the village board. "If the village board shall find and determine that all requirements of [Article III] have been met, a permit shall be issued specifying the dates and times at which solicitation may take place." § 22–21.

Charitable solicitation permits may permit solicitation only between the hours of 9 a. m. and 6 p. m., Monday through Saturday. No person who has been convicted of a felony or is under indictment for a felony may be

Solicitation of contributions for charitable organizations without a permit is prohibited and is punishable by a fine of up to $500 for each offense. Schaumburg Ordinance No. 1052, §§ 1, 8 (1974).

Section 22–20 (g), which is the focus of the constitutional challenge involved in this case, requires that permit applications, among other things, contain "[s]atisfactory proof that at least seventy-five per cent of the proceeds of such solicitations will be used directly for the charitable purpose of the organization." [4] In determining whether an organization satisfies the 75-percent requirement, the ordinance provides that

> "the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:
>
> "(1) Salaries or commissions paid to solicitors;
>
> "(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items." § 22–20 (g).

Respondent Citizens for a Better Environment (CBE) is an Illinois not-for-profit corporation organized for the purpose of promoting "the protection of the environment." CBE is registered with the Illinois Attorney General's Charitable Trust Division pursuant to Illinois law,[5] and has been afforded

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used as a solicitor. § 22–23. Section 22–24 provides that "[n]othing herein provided shall permit a solicitor to go upon any premises which has posted a sign indicating 'no solictors or peddlers invited.'"

[4] The "satisfactory proof" of compliance with the 75-percent requirement must include "a certified audit of the last full year of operations, indicating the distribution of funds collected by the organization, or such other comparable evidence as may demonstrate the fact that at least seventy-five per cent of the funds collected are utilized directly and solely for the charitable purpose of the organization." § 22–20.

[5] Illinois law requires "[e]very charitable organization . . . which solicits or intends to solicit contributions from persons in th[e] State by any

tax-exempt status by the United States Internal Revenue Service, and gifts to it are deductible for federal income tax purposes. CBE requested permission to solicit contributions in the Village, but the Village denied CBE a permit because CBE could not demonstrate that 75 percent of its receipts would be used for "charitable purposes" as required by § 22–20 (g) of the Code. CBE then sued the Village in the United States District Court for the Northern District of Illinois, charging that the 75-percent requirement of § 22–20 (g) violated the First and Fourteenth Amendments. Declaratory and injunctive relief was sought.

In its amended complaint, CBE alleged that "[i]t was organized for the purpose, among others, of protecting, maintaining, and enhancing the quality of the Illinois environment." The complaint also alleged:

> "That incident to its purpose, CBE employs 'canvassers' who are engaged in door-to-door activity in the Chicago metropolitan area, endeavoring to distribute literature on environmental topics and answer questions of an environmental nature when posed; solicit contributions to financially support the organization and its programs; receive grievances and complaints of an environmental nature regarding which CBE may afford assistance in the evaluation and redress of these grievances and complaints."

The Village's answer to the complaint averred that the foregoing allegations, even if true, would not be material to

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means whatsoever" to file a registration statement with the Illinois Attorney General. Ill. Rev. Stat., ch. 23, § 5102 (a) (1977). The registration statement must include a variety of information about the organization and its fundraising activities.

Charitable organizations are required to "maintain accurate and detailed books and records" which "shall be open to inspection at all reasonable times by the Attorney General or his duly authorized representative." § 5102 (f). Registration statements filed with the Attorney General are also open to public inspection.

the issues of the case, acknowledged that CBE employed "canvassers" to solicit funds, but alleged that "CBE is primarily devoted to raising funds for the benefit and salary of its employees and that its charitable purposes are negligible as compared with the primary objective of raising funds." The Village also alleged "that more than 60% of the funds collected [by CBE] have been spent for benefits of employees and not for any charitable purposes." [6]

CBE moved for summary judgment and filed affidavits describing its purposes and the activities of its "canvassers" as outlined in the complaint. One of the affidavits also alleged that "the door-to-door canvass is the single most important source of funds" for CBE. A second affidavit offered by CBE stated that in 1975 the organization spent 23.3% of its income on fundraising and 21.5% of its income on administration, and that in 1976 these figures were 23.3% and 16.5%, respectively. The Village opposed the motion but filed no counteraffidavits taking issue with the factual representations in CBE's affidavits.

The District Court awarded summary judgment to CBE. The court recognized that although "the government may regulate solicitation in order to protect the community from

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[6] The Village appended to its answer a copy of an article appearing in a local newspaper. "Is $$ Real Cause in Clean-Air Fight?" Suburban Trib, Nov. 10, 1976, p. 1. Based on reports on file with the Illinois Attorney General's office, the article stated that more than two-thirds of the funds collected by CBE in fiscal year 1975 were spent on salaries and employee health benefits. The article noted that in 1971 the Illinois Attorney General had sued CBE for failing to register its solicitors and for making false claims that CBE was working to " 'increase the size of the attorney general's staff and consequently their effectiveness in the fight against pollution.' " The suit was settled by a consent decree with CBE agreeing to register its solicitors and to change some of the claims it was making. The article stated that the chief of the Charitable Trusts and Solicitation Division of the Illinois Attorney General's office was convinced of CBE's commitment to environmental issues, but that his division would continue to monitor carefully the group's solicitation activities.

fraud, . . . [a]ny action impinging upon the freedom of expression and discussion . . . must be minimal, and intimately related to an articulated, substantial government interest." The court concluded that the 75-percent requirement of § 22–20 (g) of the Code on its face was "a form of censorship" prohibited by the First and Fourteenth Amendments. Section 22–20 (g) was declared void on its face, its enforcement was enjoined, and the Village was ordered to issue a charitable solicitation permit to CBE.

The Court of Appeals for the Seventh Circuit affirmed. 590 F. 2d 220 (1978). The court rejected the Village's argument that summary judgment was inappropriate because material issues of fact were disputed. Because CBE challenged the facial validity of the village ordinance on First Amendment grounds, the court held that "any issue of fact as to the nature of CBE's particular activities is not material . . . and is therefore not an obstacle to the granting of summary judgment." *Id.*, at 223. Like the District Court, the Court of Appeals recognized that the Village had a legitimate interest in regulating solicitation to protect its residents from fraud and the disruption of privacy, but that such regulation "must be done 'with narrow specificity' " when First Amendment interests are affected. *Id.*, at 223–224. The court concluded that even if the 75-percent requirement might be valid as applied to other types of charitable solicitation, the Village's requirement was unreasonable on its face because it barred solicitation by advocacy-oriented organizations even "where it is made clear that the contributions will be used for reasonable salaries of those who will gather and disseminate information relevant to the organization's purpose." *Id.*, at 226. The court distinguished *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), which upheld an ordinance authorizing denial of charitable solicitation permits to organizations with excessive solicitation costs, on the ground that although the Fort Worth ordinance deemed unreasonable solicitation costs in excess of

20 percent of gross receipts, it nevertheless permitted organizations that demonstrated the reasonableness of such costs to obtain solicitation permits.

We granted certiorari, 441 U. S. 922 (1979), to review the Court of Appeals' determination that the village ordinance violates the First and Fourteenth Amendments.

II

It is urged that the ordinance should be sustained because it deals only with solicitation and because any charity is free to propagate its views from door to door in the Village without a permit as long as it refrains from soliciting money. But this represents a far too limited view of our prior cases relevant to canvassing and soliciting by religious and charitable organizations.

In *Schneider* v. *State,* 308 U. S. 147 (1939), a canvasser for a religious society, who passed out booklets from door to door and asked for contributions, was arrested and convicted under an ordinance which prohibited canvassing, soliciting, or distribution of circulars from house to house without a permit, the issuance of which rested much in the discretion of public officials. The state courts construed the ordinance as aimed mainly at house-to-house canvassing and solicitation. This distinguished the case from *Lovell* v. *Griffin,* 303 U. S. 444 (1938), which had invalidated on its face and on First Amendment grounds an ordinance criminalizing the distribution of any handbill at any time or place without a permit. Because the canvasser's conduct "amounted to the solicitation . . . of money contributions without a permit" *Schneider, supra,* at 159, and because the ordinance was thought to be valid as a protection against fraudulent solicitations, the conviction was sustained. This Court disagreed, noting that the ordinance applied not only to religious canvassers but also to "one who wishes to present his views on political, social or economic questions," 308 U. S., at 163, and holding that the city could not, in the name of preventing fraudulent appeals, subject

door-to-door advocacy and the communication of views to the discretionary permit requirement. The Court pointed out that the ordinance was not limited to those "who canvass for private profit," *ibid.*, and reserved the question whether "commercial soliciting and canvassing" could be validly subjected to such controls. *Id.*, at 165.

Cantwell v. *Connecticut*, 310 U. S. 296 (1940), involved a state statute forbidding the solicitation of contributions of anything of value by religious, charitable, or philanthropic causes without obtaining official approval. Three members of a religious group were convicted under the statute for selling books, distributing pamphlets, and soliciting contributions or donations. Their convictions were affirmed in the state courts on the ground that they were soliciting funds and that the statute was valid as an attempt to protect the public from fraud. This Court set aside the convictions, holding that although a "general regulation, in the public interest, of solicitation, which does not involve any religious test and does not unreasonably obstruct or delay the collection of funds, is not open to any constitutional objection," *id.*, at 305, to "condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause," *id.*, at 307, was considered to be an invalid prior restraint on the free exercise of religion. Although *Cantwell* turned on the Free Exercise Clause, the Court has subsequently understood *Cantwell* to have implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S. 748, 761 (1976); *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 363 (1977).

In *Valentine* v. *Chrestensen*, 316 U. S. 52 (1942), an arrest was made for distributing on the public streets a commercial advertisement in violation of an ordinance forbidding this distribution. Addressing the question left open in *Schneider*,

the Court recognized that while municipalities may not unduly restrict the right of communicating information in the public streets, the "Constitution imposes no such restraint on government as respects purely commercial advertising." 316 U. S., at 54. The Court reasoned that unlike speech "communicating information and disseminating opinion" commercial advertising implicated only the solicitor's interest in pursuing "a gainful occupation." *Ibid.*

The following Term in *Jamison* v. *Texas*, 318 U. S. 413 (1943), the Court, without dissent, and with the agreement of the author of the *Chrestensen* opinion, held that although purely commercial leaflets could be banned from the streets, a State could not "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of books for the improved understanding of the religion or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes." 318 U. S., at 417. The Court reaffirmed what it deemed to be an identical holding in *Schneider*, as well as the ruling in *Cantwell* that "a state might not prevent the collection of funds for a religious purpose by unreasonably obstructing or delaying their collection." 318 U. S., at 417. See also, *Largent* v. *Texas*, 318 U. S. 418 (1943).

In the course of striking down a tax on the sale of religious literature, the majority opinion in *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943), reiterated the holding in *Jamison* that the distribution of handbills was not transformed into an unprotected commercial activity by the solicitation of funds. Recognizing that drawing the line between purely commercial ventures and protected distributions of written material was a difficult task, the Court went on to hold that the sale of religious literature by itinerant evangelists in the course of spreading their doctrine was not a commercial enterprise beyond the protection of the First Amendment.

On the same day, the Court invalidated a municipal ordinance that forbade the door-to-door distribution of handbills,

circulars, or other advertisements. None of the justifications for the general prohibition was deemed sufficient; the right of the individual resident to warn off such solicitors was deemed sufficient protection for the privacy of the citizen. *Martin* v. *Struthers,* 319 U. S. 141 (1943). On its facts, the case did not involve the solicitation of funds or the sale of literature.

Thomas v. *Collins,* 323 U. S. 516 (1945), held that the First Amendment barred enforcement of a state statute requiring a permit before soliciting membership in any labor organization. Solicitation and speech were deemed to be so intertwined that a prior permit could not be required. The Court also recognized that "espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause." *Id.,* at 538. The Court rejected the notion that First Amendment claims could be dismissed merely by urging "that an organization for which the rights of free speech and free assembly are claimed is one 'engaged in business activities' or that the individual who leads it in exercising these rights receives compensation for doing so." *Id.,* at 531. Concededly, the "collection of funds" might be subject to reasonable regulation, but the Court ruled that such regulation "must be done, and the restriction applied, in such a manner as not to intrude upon the rights of free speech and free assembly." *Id.,* at 540–541.

In 1951, *Breard* v. *Alexandria,* 341 U. S. 622, was decided. That case involved an ordinance making it criminal to enter premises without an invitation to sell goods, wares, and merchandise. The ordinance was sustained as applied to door-to-door solicitation of magazine subscriptions. The Court held that the sale of literature introduced "a commercial feature," *id.,* at 642, and that the householder's interest in privacy outweighed any rights of the publisher to distribute magazines by uninvited entry on private property. The Court's opinion, however, did not indicate that the solicitation of gifts or contributions by religious or charitable organizations should be deemed commercial activities, nor did the facts of

Breard involve the sale of religious literature or similar materials. *Martin* v. *Struthers, supra,* was distinguished but not overruled.

Hynes v. *Mayor of Oradell,* 425 U. S. 610 (1976), dealt with a city ordinance requiring an identification permit for canvassing or soliciting from house to house for charitable or political purposes. Based on its review of prior cases, the Court held that soliciting and canvassing from door to door were subject to reasonable regulation so as to protect the citizen against crime and undue annoyance, but that the First Amendment required such controls to be drawn with " 'narrow specificity.' " *Id.,* at 620. The ordinance was invalidated as unacceptably vague.

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.[7]

[7] To the extent that any of the Court's past decisions discussed in Part II hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law. *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425

III

The issue before us, then, is not whether charitable solicitations in residential neighborhoods are within the protections of the First Amendment. It is clear that they are. "[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money, *New York Times Co.* v. *Sullivan*, [376 U. S. 254 (1964)]." *Bates* v. *State Bar of Arizona*, 433 U. S., at 363.

The issue is whether the Village has exercised its power to regulate solicitation in such a manner as not unduly to intrude upon the rights of free speech. *Hynes* v. *Mayor of Oradell*, *supra*, at 616. In pursuing this question we must first deal with the claim of the Village that summary judgment was improper because there was an unresolved factual dispute concerning the true character of CBE's organization. Although CBE's affidavits in support of its motion for summary judgment and describing its interests, the activities of its canvassers, and the percentage of its receipts devoted to salaries and administrative expenses were not controverted, the District Court made no findings with respect to the nature of CBE's activities; and the Court of Appeals expressly stated that the facts with respect to the internal affairs and operations of the organization were immaterial to a proper resolution of the case. The Village claims, however, that it should have had a chance to prove that the 75-percent requirement is valid as applied to CBE because CBE spends so much of its resources for the benefit of its employees that it may appropriately be deemed an organization existing for private profit rather than for charitable purposes.

We agree with the Court of Appeals that CBE was en-

U. S. 748, 758–759, 762 (1976). For the purposes of applying the overbreadth doctrine, however, see *infra*, at 634, it remains relevant to distinguish between commercial and noncommercial speech. *Bates* v. *State Bar of Arizona*, 433 U. S. 350, 381 (1977).

titled to its judgment of facial invalidity if the ordinance purported to prohibit canvassing by a substantial category of charities to which the 75-percent limitation could not be applied consistently with the First and Fourteenth Amendments, even if there was no demonstration that CBE itself was one of these organizations.[8] Given a case or controversy, a litigant whose own activities are unprotected may nevertheless challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court. *Grayned* v. *City of Rockford*, 408 U. S. 104, 114–121 (1972); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942); *Schneider* v. *State*, 308 U. S., at 162–165; *Lovell* v. *Griffin*, 303 U. S., at 451; *Thornhill* v. *Alabama*, 310 U. S. 88, 97 (1940). See also the discussion in *Broadrick* v. *Oklahoma*, 413 U. S. 601, 612–616 (1973), and in *Bigelow* v. *Virginia*, 421 U. S. 809, 815–817 (1975). In these First Amendment contexts, the courts are inclined to disregard the normal rule against permitting one whose conduct may validly be prohibited to challenge the proscription as it applies to others because of the possibility that protected speech or associative activities may be inhibited by the overly broad reach of the statute.

We have declared the overbreadth doctrine to be inapplicable in certain commercial speech cases, *Bates* v. *State Bar of Arizona*, *supra*, at 381, but as we have indicated, that limitation does not concern us here. The Court of Appeals was thus free to inquire whether § 22–20 (g) was overbroad, a question of law that involved no dispute about the characteristics of CBE. On this basis, proceeding to rule on the merits of

[8] CBE defends the rationale of the Court of Appeals, but it also asserts that the facts concerning its purposes and its operations were uncontroverted and are sufficiently complete to demonstrate that the 75-percent limitation is invalid as applied to it. As a respondent, CBE is entitled to urge its position although the Court of Appeals did not reach it; but we need not pursue it since we do not conclude that the Court of Appeals was in error.

the summary judgment was proper. As we have indicated, we also agree with the Court of Appeals' ruling on the motion.

IV

Although indicating that the 75-percent limitation might be enforceable against the more "traditional charitable organizations" or "where solicitors represent themselves as mere conduits for contributions," 590 F. 2d, at 225, 226, the Court of Appeals identified a class of charitable organizations as to which the 75-percent rule could not constitutionally be applied. These were the organizations whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern. These organizations characteristically use paid solicitors who "necessarily combine" the solicitation of financial support with the "functions of information dissemination, discussion, and advocacy of public issues." *Id.*, at 225. These organizations also pay other employees to obtain and process the necessary information and to arrive at and announce in suitable form the organizations' preferred positions on the issues of interest to them. Organizations of this kind, although they might pay only reasonable salaries, would necessarily spend more than 25 percent of their budgets on salaries and administrative expenses and would be completely barred from solicitation in the Village.[9] The Court of Appeals

[9] The village ordinance requires all charitable organizations that seek "to solicit contributions from persons in the village by door-to-door solicitation or the use of public streets and public ways" to obtain a charitable solicitation permit. Code § 22–20. Solicitation without a permit is prohibited. Schaumburg Ordinance No. 1052, § 1 (1974). Unlike the ordinance upheld in *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), the village ordinance has no provision permitting an organization unable to comply with the 75-percent requirement to obtain a permit by demonstrating that its solicitation costs are nevertheless reasonable. Moreover, because compliance with the 75-percent requirement depends on organizations' receipts and expenses dur-

concluded that such a prohibition was an unjustified infringement of the First and Fourteenth Amendments.

We agree with the Court of Appeals that the 75-percent limitation is a direct and substantial limitation on protected activity that cannot be sustained unless it serves a sufficiently strong, subordinating interest that the Village is entitled to protect. We also agree that the Village's proffered justifications are inadequate and that the ordinance cannot survive scrutiny under the First Amendment.

The Village urges that the 75-percent requirement is intimately related to substantial governmental interests "in protecting the public from fraud, crime and undue annoyance." These interests are indeed substantial, but they are only peripherally promoted by the 75-percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.

Prevention of fraud is the Village's principal justification for prohibiting solicitation by charities that spend more than one-quarter of their receipts on salaries and administrative expenses. The submission is that any organization using more than 25 percent of its receipts on fundraising, salaries, and overhead is not a charitable, but a commercial, for-profit enterprise and that to permit it to represent itself as a charity is fraudulent. But, as the Court of Appeals recognized, this cannot be true of those organizations that are primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as

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ing the previous year, there appears to be no way an organization can alter its spending patterns to comply with the ordinance in the short run. Thus, the village ordinance effectively bars all in-person solicitation by organizations who spent more than one-quarter of their receipts in the previous year on salaries and administrative expenses.

Although there is some suggestion that organizations unable to comply with the 75-percent requirement may be able to obtain commercial solicitation permits, the ordinance governing issuance of such permits appears to apply only to solicitors offering goods or services for sale. Code § 22–6.

to solicit financial support. The Village, consistently with the First Amendment, may not label such groups "fraudulent" and bar them from canvassing on the streets and house to house.[10] Nor may the Village lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other. The Village may serve its legitimate interests, but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. *Hynes* v. *Mayor of Oradell*, 425 U. S., at 620; *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 786 (1978). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone. . . ." *NAACP* v. *Button*, 371 U. S. 415, 438 (1963) (citations omitted).

The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. *Schneider* v. *State*, 308 U. S., at 164; *Cantwell* v. *Connecticut*, 310 U. S., at 306; *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, 425 U. S., at 771.[11] Ef-

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[10] There is no dispute that organizations of the kind described in CBE's affidavits are considered to be nonprofit, charitable organizations under both federal and state law, despite the fact that they devote more than one-quarter of their receipts to salaries and administrative expenses. The costs incurred by charitable organizations conducting fundraising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization.

[11] The Village Code, for example, already contains direct proscriptions of fraud by commercial solicitors. Section 22–12 makes it "unlawful for any peddler or solicitor to cheat, deceive or fraudulently misrepresent, whether through himself or through an employee, while acting as a peddler or solicitor in the village. . . ." Unlike the situation in *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447 (1978), where we upheld disciplinary action taken against an attorney who solicited accident victims for the purpose of

forts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed.[12] Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.

We also fail to perceive any substantial relationship between the 75-percent requirement and the protection of public safety or of residential privacy. There is no indication that organizations devoting more than one-quarter of their funds to salaries and administrative expenses are any more likely to employ solicitors who would be a threat to public safety than are other charitable organizations.[13] Other provisions in the ordinance that are not challenged here, such as the provision making it unlawful for charitable organizations to use convicted felons as solicitors, Code § 22–23, may bear some relation to public safety; the 75-percent requirement does not.

The 75-percent requirement is related to the protection of privacy only in the most indirect of ways. As the Village concedes, householders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations. The 75-percent requirement protects privacy only by reducing the total number of solicitors, as would any prohibition on solicitation. The ordinance is not directed to the unique privacy interests of persons residing in their homes

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obtaining remunerative employment, charitable solicitation is not so inherently conducive to fraud and overreaching as to justify its prohibition.

[12] Illinois law, for example, requires charitable organizations to register with the State Attorney General's Office and to report certain information about their structure and fundraising activities. Ill. Rev. Stat., ch. 23, § 5102 (a) (1977). See n. 5, *supra*.

[13] Indeed, solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitation by organizations using volunteers.

because it applies not only to door-to-door solicitation, but also to solicitation on "public streets and public ways." § 22–20. Other provisions of the ordinance, which are not challenged here, such as the provision permitting homeowners to bar solicitors from their property by posting signs reading "No Solicitors or Peddlers Invited," § 22–24, suggest the availability of less intrusive and more effective measures to protect privacy. See *Rowan* v. *Post Office Dept.*, 397 U. S. 728 (1970); *Martin* v. *Struthers*, 319 U. S., at 148.

The 75-percent requirement in the village ordinance plainly is insufficiently related to the governmental interests asserted in its support to justify its interference with protected speech. "Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than . . . [deciding in advance] what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Schneider* v. *State, supra*, at 164.

We find no reason to disagree with the Court of Appeals' conclusion that § 22–20 (g) is unconstitutionally overbroad. Its judgment is therefore affirmed.

It is so ordered.

MR. JUSTICE REHNQUIST, dissenting.

The Court holds that Art. III of the Schaumburg Village Code is unconstitutional as applied to prohibit respondent Citizens for a Better Environment (CBE) from soliciting contributions door to door. If read in isolation, today's decision might be defensible. When combined with this Court's earlier pronouncements on the subject, however, today's decision relegates any local government interested in regulating door-to-door activities to the role of Sisyphus.

The Court's opinion first recites the litany of language from 40 years of decisions in which this Court has considered various

restrictions on the right to distribute information or solicit door to door, concluding from these decisions that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests . . . that are within the protection of the First Amendment." *Ante,* at 632. I would have thought this proposition self-evident now that this Court has swept even the most banal commercial speech within the ambit of the First Amendment. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976). But, having arrived at this conclusion on the basis of earlier cases, the Court effectively departs from the reasoning of those cases in discussing the limits on Schaumburg's authority to place limitations on so-called "charitable" solicitors who go from house to house in the village.

The Court's neglect of its prior precedents in this regard is entirely understandable, since the earlier decisions striking down various regulations covering door-to-door activities turned upon factors not present in the instant case. A plurality of these decisions turned primarily, if not exclusively, upon the amount of discretion vested in municipal authorities to grant or deny permits on the basis of vague or even nonexistent criteria. See *Schneider* v. *State,* 308 U. S. 147, 163–164 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296, 305–306 (1940); *Largent* v. *Texas,* 318 U. S. 418, 422 (1943); *Hynes* v. *Mayor of Oradell,* 425 U. S. 610, 620–621 (1976). In *Schneider,* for example, the Court invalidated such an ordinance as applied to Jehovah's Witnesses because "in the end, [the applicant's] liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." 308 U. S., at 164. These cases clearly do not control the validity of Schaumburg's ordinance, which leaves virtually no discretion in the hands of the licensing authority.

Another line of earlier cases involved the distribution of information, as opposed to requests for contributions. *Martin* v. *Struthers,* 319 U. S. 141 (1943), for example, dealt with

Jehovah's Witnesses who had gone door to door with invitations to a religious meeting despite a local ordinance prohibiting distribution of any "handbills, circulars or other advertisements" door to door. The Court noted that such an ordinance "limits the dissemination of knowledge," and that it could "serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.*, at 144, 147.

Here, however, the challenged ordinance deals not with the dissemination of ideas, but rather with the solicitation of money. That the *Martin* Court would have found this distinction important is apparent not only from *Martin*'s emphasis on the dissemination of knowledge, but also from various other decisions of the same period. In *Breard* v. *Alexandria*, 341 U. S. 622 (1951), for example, the Court upheld an ordinance prohibiting "solicitors, peddlers, hawkers, itinerant merchants, or transient vendors of merchandise" from entering private property without permission. The petitioner in *Breard* had been going door to door soliciting subscriptions for magazines. Despite petitioner's invocation of both freedom of speech and freedom of the press, the Court distinguished the "commercial feature" of the transactions from their informational overtone. See *id.*, at 642. Because *Martin* "was narrowly limited to the precise fact of the free distribution of an invitation to religious services," the Court found that it was "not necessarily inconsistent with the conclusion reached in this case." 341 U. S., at 643.

Shunning the guidance of these cases, the Court sets out to define a new category of solicitors who may not be subjected to regulation. According to the Court, Schaumburg cannot prohibit door-to-door solicitation for contributions by "organizations whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern." *Ante*, at 635. In another portion of its opinion, the majority redefines this immunity as extending to all

organizations "primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out these functions as well as to solicit financial support." *Ante*, at 636–637. This result—or perhaps, more accurately, these results—seem unwarranted by the First and Fourteenth Amendments for three reasons.

First, from a legal standpoint, the Court invites municipalities to draw a line it has already erased. Today's opinion strongly, and I believe correctly, implies that the result here would be otherwise if CBE's primary objective were to provide "information about the characteristics and costs of goods and services," *ante*, at 632, rather than to "advocate positions on matters of public concern." *Ante*, at 635. Four years ago, however, the Court relied upon the supposed bankruptcy of this very distinction in overturning a prohibition on advertising by pharmacists. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council*, *supra*. According to *Virginia Pharmacy*, while "not all commercial messages contain the same or even a very great public interest element[,] [t]here are few to which such an element . . . could not be added." 425 U. S., at 764. This and other considerations led the Court in that case to conclude that "no line between publicly 'interesting' or 'important' commercial advertising and the opposite kind could ever be drawn." *Id.*, at 765. To the extent that the Court found such a line elusive in *Virginia Pharmacy*, I venture to suggest that the Court, as well as local legislators, will find the line equally elusive in the context of door-to-door solicitation.

Second, from a practical standpoint, the Court gives absolutely no guidance as to how a municipality might identify those organizations "whose primary purpose is . . . to gather and disseminate information about and advocate positions on matters of public concern," and which are therefore exempt from Art. III. Earlier cases do provide one guideline: the municipality must rely on objective criteria, since reliance

upon official discretion in any significant degree would clearly run afoul of *Schneider*, *Cantwell*, *Largent*, and *Hynes*.[1] In requiring municipal authorities to use "more precise measures to separate" constitutionally preferred organizations from their less preferred counterparts, *ante*, at 637, the Court would do well to remember that these local bodies are poorly equipped to investigate and audit the various persons and organizations that will apply to them for preferred status. Stripped of discretion, they must be able to resort to a line-drawing test capable of easy and reliable application without the necessity for an exhaustive case-by-case investigation of each applicant.[2]

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[1] In this regard, I find somewhat surprising the Court's reference to the ordinance considered in *National Foundation* v. *Fort Worth*, 415 F. 2d 41 (CA5 1969), cert. denied, 396 U. S. 1040 (1970), as if it were an improvement on Schaumburg's ordinance. See *ante*, at 635, n. 9. Fort Worth requires solicitors to demonstrate that the cost of soliciting will not exceed 20 percent of the amount expected to be raised. The Court finds appeal, however, in the ability of Fort Worth's officials to waive that requirement if the applicant can show that the costs of solicitation are "not unreasonable." See 415 F. 2d, at 44, n. 2. Given the potential for abuse of this open-ended grant of discretion, I would think that Fort Worth's ordinance would be more, not less, suspect than Schaumburg's.

[2] The Court implies that an organization's eligibility for tax-exempt status under state or federal law could determine its eligibility for preferred constitutional status in its fundraising efforts. See *ante*, at 637, n. 10. Such a rule, although superficially appealing, suffers from serious drawbacks. The availability of such exemptions and deductions is a matter of legislative grace, not constitutional privilege. See *Commissioner* v. *Sullivan*, 356 U. S. 27, 28 (1958). See also *Lewyt Corp.* v. *Commissioner*, 349 U. S. 237, 240 (1955). Indeed, prior to the Tax Reform Act of 1976, a federal exemption was not available to any organization that devoted a "substantial part" of its activities to attempts "to influence legislation." See 26 U. S. C. § 501 (c)(3), as amended by Pub. L. 94–455, 90 Stat. 1727. See also 1976 U. S. Code Cong. & Admin. News 2897, 4104–4109. Even today there are strict limitations on the amount a tax-exempt organization can spend on such activities. See 26 U. S. C. § 501 (h). Nevertheless, I imagine that the lobbying activities previously excluded from, and now closely regulated by, § 501 would lie close to the core of those activities that the Court seeks to protect. For this reason, I cannot believe that

Finally, I believe that the Court overestimates the value, in a constitutional sense, of door-to-door solicitation for financial contributions and simultaneously underestimates the reasons why a village board might conclude that regulation of such activity was necessary. In *Hynes* v. *Mayor of Oradell*, this Court referred with approval to Professor Zechariah Chafee's observation that "[o]f all the methods of spreading unpopular ideas, [house-to-house convassing] seems the least entitled to extensive protection." 425 U. S., at 619, quoting Z. Chafee, Free Speech in the United States 406 (1954). While such activity may be worthy of heightened protection when limited to the dissemination of information, see, *e. g.*, *Martin* v. *Struthers*, 319 U. S. 141 (1943), or when designed to propagate religious beliefs, see, *e. g.*, *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), I believe that a simple request for money lies far from the core protections of the First Amendment as heretofore interpreted. In the case of such solicitation, the community's interest in insuring that the collecting organization meet some objective financial criteria is indisputably valid. Regardless of whether one labels noncharitable solicitation "fraudulent," nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers.

The central weakness of the Court's decision, I believe, is its failure to recognize, let alone confront, the two most important issues in this case: how does one define a "charitable" organization, and to which authority in our federal system is application of that definition confided? I would uphold Schaumburg's ordinance as applied to CBE because that ordi-

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the Court bases CBE's First Amendment protection on such sandy soil. Yet it gives no indication what other objectively verifiable characteristics might render an organization eligible for preferred status under the First Amendment.

nance, while perhaps too strict to suit some tastes, affects only door-to-door solicitation for financial contributions, leaves little or no discretion in the hands of municipal authorities to "censor" unpopular speech, and is rationally related to the community's collective desire to bestow its largess upon organizations that are truly "charitable." I therefore dissent.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* REGAN, COMPTROLLER OF NEW YORK, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 78–1369. Argued November 27, 1979—Decided February 20, 1980

After a New York statute that appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State, including the administration, grading, and reporting of the results of tests, both state-prepared and teacher-prepared tests, had been held to be violative of the Establishment Clause of the First Amendment in *Levitt* v. *Committee for Public Education*, 413 U. S. 472, the New York Legislature enacted a new statute directing payment to nonpublic schools of the costs incurred by them in complying with certain state-mandated requirements, including requirements as to testing (pupil evaluation, achievement, and scholarship and college qualification tests) and as to reporting and recordkeeping. The new statute, unlike the earlier version, also provides a means by which state funds are audited, thus ensuring that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds. The District Court ultimately upheld the new statute.

Held: The New York statute does not violate the First and Fourteenth Amendments. Pp. 653–662.

(a) A legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. P. 653.

(b) The New York statute has the secular purpose of providing educational opportunity of a quality that will prepare New York citizens for the challenges of American life. The statutory plan calls for tests that are prepared by the State and administered on the premises by personnel of the nonpublic schools, which, however, have no control over the contents of the tests. Although some of the tests are graded by nonpublic school personnel, in view of the nature of the tests, which deal only with secular academic matters, the grading by nonpublic school employees affords no control to the school over the outcome of

any of the tests, and there is no substantial risk that the examinations can be used for religious educational purposes. While the recordkeeping and reporting services for which the State reimburses the nonpublic school pertain to furnishing information regarding the student body, faculty, support staff, physical facilities, curriculum, and student attendance, and thus are related to the educational program, nevertheless they are not part of the teaching process and cannot be used to foster an ideological outlook. Thus, reimbursement for the costs of so complying with state law has primarily a secular, rather than a religious purpose and effect. *Wolman* v. *Walter*, 433 U. S. 229, controlling. Pp. 654–657.

(c) The New York statute is not invalid simply because it provides for direct cash reimbursement to the nonpublic school for administering the state-prescribed examinations and for grading some of them. Grading the secular tests furnished by the State is a function that has a secular purpose and primarily a secular effect, and this is not changed simply because the State pays the school for performing the grading function rather than paying state employees or some independent service to perform the task. The same results obtain as to reimbursement for the recordkeeping and reporting functions because they also have neither a religious purpose nor a primarily religious effect. Pp. 657–659.

(d) The New York law provides ample safeguards against excessive or misdirected reimbursement. The services for which the private schools are reimbursed are discrete and clearly identifiable, and the statutory reimbursement process is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and the bad faith upon which any future excessive entanglement would be predicated will not be read into the plan as an inevitability. Pp. 659–661.

(e) The decision in *Meek* v. *Pittenger*, 421 U. S. 349, is not to be interpreted as holding that any aid to even secular educational functions of a sectarian school is forbidden, or, more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each of its activities. The District Court in the instant case properly put the *Meek* case and the *Wolman* case, *supra*, together and sustained the reimbursements involved here because it had been shown with sufficient clarity that they would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views. Pp. 661–662.

461 F. Supp. 1123, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 662. STEVENS, J., filed a dissenting opinion, *post*, p. 671.

Leo Pfeffer argued the cause and filed a brief for appellants.

Shirley Adelson Siegel, Solicitor General of New York, argued the cause for appellees Regan et al. With her on the brief were *Robert Abrams*, Attorney General, and *John Q. Driscoll*, Assistant Attorney General. *Richard E. Nolan* argued the cause for appellee schools. With him on the brief was *Thomas J. Aquilino, Jr.* *Nathan Lewin* and *Dennis Rapps* filed a brief for appellee Yeshivah Rambam.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the constitutionality under the First and Fourteenth Amendments of the United States Constitution of a New York statute authorizing the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law. The District Court sustained the statute. *Committee for Public Education* v. *Levitt*, 461 F. Supp. 1123 (1978). We noted probable jurisdiction, 442 U. S. 928 (1979), and now affirm the District Court's judgment.

I

In 1970, the New York Legislature appropriated public funds to reimburse both church-sponsored and secular nonpublic schools for performing various services mandated by the State. The most expensive of these services was the "administration, grading and the compiling and reporting of the results of tests and examinations." 1970 N. Y. Laws, ch. 138, § 2. Covered tests included both state-prepared examinations and the more common and traditional teacher-prepared tests. Although the legislature stipulated that "[n]othing contained in this act shall be construed to authorize the making of any payment under this act for religious

worship or instruction," § 8, the statute did not provide for any state audit of school financial records that would ensure that public funds were used only for secular purposes.

In *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973) (*Levitt I*), the Court struck down this enactment as violative of the Establishment Clause.[1] The majority focused its concern on the statute's reimbursement of funds spent by schools on traditional teacher-prepared tests. The Court was troubled that, "despite the obviously integral role of such testing in the total teaching process, no attempt is made under the statute, and no means are available, to assure that internally prepared tests are free of religious instruction." *Id.*, at 480. It was not assumed that nonpublic school teachers would attempt in bad faith to evade constitutional requirements. Rather, the Court simply observed that "the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." *Ibid.*, quoting *Lemon* v. *Kurtzman*, 403 U. S. 602, 617 (1971). Because the State failed to provide the required assurance, the challenged statute was deemed to constitute an impermissible aid to religion.

The Court distinguished its earlier holdings in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968), on grounds that the state aid upheld in those cases, in the form of bus rides and loaned secular textbooks for sectarian schoolchildren, was "of a substantially different character" from that presented in *Levitt I*. *Levitt I*, *supra*, at 481. Teacher-prepared tests were deemed by the Court to be an integral part of the teaching process. But obviously so are textbooks an integral part of the teaching

[1] The First Amendment provides that "Congress shall make no law respecting an establishment of religion. . . ." This Court has repeatedly held the Establishment Clause applicable to the States through the Fourteenth Amendment. *E. g.*, *Meek* v. *Pittenger*, 421 U. S. 349, 351 (1975); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

process. The crucial feature that distinguished tests, according to the Court, was that, "'[i]n terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not.'" 413 U. S., at 481, quoting *Lemon* v. *Kurtzman, supra,* at 617. Thus, the inherent teacher discretion in devising, presenting, and grading traditional tests, together with the failure of the legislature to provide for a method of auditing to ensure that public funds would be spent exclusively on secular services, disabled the enactment from withstanding constitutional scrutiny.[2]

Almost immediately the New York Legislature attempted to eliminate these defects from its statutory scheme. A new statute was enacted in 1974,[3] and it directed New York's Com-

[2] The majority in *Levitt I* concluded:

"We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause. Since Chapter 138 provides only for a single per-pupil allotment for a variety of specified services, some secular and some potentially religious, neither this Court nor the District Court can properly reduce that allotment to an amount corresponding to the actual costs incurred in performing reimbursable secular services. That is a legislative, not a judicial, function." 413 U. S., at 482.

[3] Chapter 507, 1974 N. Y. Laws, as amended by ch. 508, note following N. Y. Educ. Law § 3601 (McKinney Supp. 1971–1979), provides in relevant part:

"Section 1. Legislative findings. The legislature hereby finds and declares that:

"The state has the responsibility to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life in the last decades of the twentieth century.

"To fulfill this responsibility, the state has the duty and authority to evaluate, through a system of uniform state testing and reporting procedures, the quality and effectiveness of instruction to assure that those who are attending instruction, as required by law, are being adequately educated within their individual capabilities.

"In public schools these fundamental objectives are accomplished in part through state financial assistance to local school districts.

"More than seven hundred thousand pupils in the state comply with the compulsory education law by attending nonpublic schools. It is a

missioner of Education to apportion and to pay to nonpublic schools the actual costs incurred as a result of compliance with certain state-mandated requirements, including

"the requirements of the state's pupil evaluation program,

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matter of state duty and concern that such nonpublic schools be reimbursed for the actual costs which they incur in providing services to the state which they are required by law to render in connection with the state's responsibility for reporting, testing and evaluating.

. . . . . .

"§ 3. Apportionment. The commissioner shall annually apportion to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy-four, an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

. . . . . .

"§ 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers, or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.

"The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

. . . . . .

"§ 9. In enacting this chapter it is the intention of the legislature that if section seven or any other provision of this act or any rules or regulations promulgated thereunder shall be held by any court to be invalid in whole or in part or inapplicable to any person or situation, all remaining provisions or parts thereof or remaining rules and regulations or parts thereof not so invalidated shall nevertheless remain fully effective as if the invalidated portion had not been enacted or promulgated, and

> the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures." 1974 N. Y. Laws, ch. 507, § 3.

Of signal interest and importance in light of *Levitt I*, the new scheme does not reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests. Further, the 1974 statute, unlike the 1970 version struck down in *Levitt I*, provides a means by which payments of state funds are audited, thus ensuring that only the actual costs incurred in providing the covered secular services are reimbursed out of state funds. § 7.

Although the new statutory scheme was tailored to comport with the reasoning in *Levitt I*, the District Court invalidated the enactment with respect to both the tests and the reporting procedure. *Committee for Public Education* v. *Levitt*, 414 F. Supp. 1174 (1976) (*Levitt II*). The District Court understood the decision in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), to require this result. In *Meek*, decided after *Levitt I*, this Court held unconstitutional two Pennsylvania statutes insofar as they provided auxiliary services and instructional material and equipment apart from textbooks to nonpublic schools in the State, most of which were sectarian. The Court ruled that in "religion-pervasive" institutions, secular and religious education are so "inextricably intertwined" that "[s]ubstantial aid to the education function of such schools . . . necessarily results in aid to the sectarian school enterprise as a whole" and hence amounts to a forbidden establishment of religion. 421 U. S., at 366.

Levitt II was appealed to this Court. We vacated the District Court's judgment and remanded the case in light of our decision in *Wolman* v. *Walter*, 433 U. S. 229 (1977). On

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the application of any such invalidated portion to other persons not similarly situated or other situations shall not be affected thereby."

remand the District Court ruled that under *Wolman* "state aid may be extended to [a sectarian] school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views." 461 F. Supp., at 1127. Applying this "more flexible concept," *ibid.*, the District Court concluded that New York's statutory scheme of reimbursement did not violate the Establishment Clause.

Our jurisdiction to review the District Court's judgment lies under 28 U. S. C. § 1253.

II

Under the precedents of this Court a legislative enactment does not contravene the Establishment Clause if it has a secular legislative purpose, if its principal or primary effect neither advances nor inhibits religion, and if it does not foster an excessive government entanglement with religion. See *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 748 (1976); *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 772–773 (1973); *Lemon* v. *Kurtzman*, 403 U. S., at 612–613.

In *Wolman* v. *Walter*, *supra*, this Court reviewed and sustained in relevant part an Ohio statutory scheme that authorized, *inter alia*, the expenditure of state funds

> "[t]o supply for use by pupils attending nonpublic schools within the district such standardized tests and scoring services as are in use in the public schools of the state." Ohio Rev. Code Ann. § 3317.06 (J) (Supp. 1976).

We held that this provision, which was aimed at providing the young with an adequate secular education, reflected a secular state purpose. As the opinion of MR. JUSTICE BLACKMUN stated, "[t]he State may require that schools that are utilized to fulfill the State's compulsory-education requirement meet certain standards of instruction, . . . and may examine both

teachers and pupils to ensure that the State's legitimate interest is being fulfilled." *Wolman* v. *Walter, supra,* at 240. See *Levitt I,* 413 U. S., at 479–480, n. 7; *Lemon* v. *Kurtzman, supra,* at 614. MR. JUSTICE BLACKMUN further explained that under the Ohio provision the nonpublic school did not control the content of the test or its result. This "serves to prevent the use of the test as a part of religious teaching, and thus avoids that kind of direct aid to religion found present in *Levitt* [*I*]." *Wolman* v. *Walter,* 433 U. S., at 240. The provision of testing services hence did not have the primary effect of aiding religion. *Ibid.* It was also decided that "the inability of the school to control the test eliminates the need for the supervision that gives rise to excessive entanglement." *Id.,* at 240–241. We thus concluded that the Ohio statute, insofar as it concerned examinations, passed our Establishment Clause tests.

III

We agree with the District Court that *Wolman* v. *Walter* controls this case. Although the Ohio statute under review in *Wolman* and the New York statute before us here are not identical, the differences are not of constitutional dimension. Addressing first the testing provisions, we note that here, as in *Wolman,* there is clearly a secular purpose behind the legislative enactment: "[T]o provide educational opportunity of a quality which will prepare [New York] citizens for the challenges of American life in the last decades of the twentieth century." 1974 N. Y. Laws, ch. 507, § 1. Also like the Ohio statute, the New York plan calls for tests that are prepared by the State and administered on the premises by nonpublic school personnel. The nonpublic school thus has no control whatsoever over the content of the tests. The Ohio tests, however, were graded by the State; here there are three types of tests involved, one graded by the State and the other two by nonpublic school personnel, with the costs of the grading service, as well as the cost of administering all three

tests, being reimbursed by the State. In view of the nature of the tests, the District Court found that the grading of the examinations by nonpublic school employees afforded no control to the school over the outcome of any of the tests.

The District Court explained that the state-prepared tests are primarily of three types: pupil evaluation program (PEP) tests, comprehensive ("end-of-the-course") achievement tests, and Regents Scholarship and College Qualifications Tests (RSCQT). 461 F. Supp., at 1125. Each of the tests addresses a secular academic subject; none deals with religious subject matter.[4] The RSCQT examinations are graded by State Education Department personnel, and the District Court correctly concluded that "the risk of [RSCQT examinations] being used for religious purposes through grading is non-existent." *Id.*, at 1128. The PEP tests, administered universally in grades 3 and 6 and optionally in grade 9, are graded by nonpublic school employees, but they "consist entirely of objective, multiple-choice questions, which can be graded by machine and, even if graded by hand, afford the schools no more control over the results than if the tests were graded by the State." *Ibid.* The comprehensive tests, based on state courses of study for use in grades 9 through 12, are also graded on the premises by school employees, but "consist

[4] PEP tests are "standardized reading and mathematics achievement tests developed and published by the Educational Department and based on New York State courses of study." App. 28a. Comprehensive tests correspond to the following subject areas: biology; bookkeeping and accounting II; business law; business mathematics; chemistry; earth science; English; French; German; Hebrew; Italian; Latin; 9th-year mathematics; 10th-year mathematics; 11th-year mathematics; physics; shorthand II and transcription; social studies; and Spanish. 461 F. Supp., at 1125, n. 3. The RSCQT tests are divided into two parts. Part 1 is a "test of general scholastic aptitude, containing questions intended to measure ability to think clearly and accurately." App. 38a. Part 2 is "a test of subject matter achievement directly related to courses studied in high school." *Ibid.*

Clearly, the tests at issue are secular in character.

largely or entirely of objective questions with multiple-choice answers." *Id.*, at 1125. Even though some of the comprehensive tests may include an essay question or two, *ibid.*, the District Court found that the chance that grading the answers to state-drafted questions in secular subjects could or would be used to gauge a student's grasp of religious ideas was "minimal," especially in light of the "complete" state procedures designed to guard against serious inconsistencies in grading and any misuse of essay questions. *Id.*, at 1128–1129. These procedures include the submission of completed and graded comprehensive tests to the State Department of Education for review off the school premises.

We see no reason to differ with the factual or legal characterization of the testing procedure arrived at by the District Court. As in *Wolman* v. *Walter*, 433 U. S., at 240, "[t]he nonpublic school does not control the content of the test or its result"; and here, as in *Wolman*, this factor "serves to prevent the use of the test as a part of religious teaching," *ibid.*, thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes.

The District Court was also correct in its characterization of the recordkeeping and reporting services for which the State reimburses the nonpublic school. Under the New York law, "[e]ach year, private schools must submit to the State a Basic Educational Data System (BEDS) report. This report contains information regarding the student body, faculty, support staff, physical facilities, and curriculum of each school. Schools are also required to submit annually a report showing the attendance record of each minor who is a student at the school." 461 F. Supp., at 1126. Although recordkeeping is related to the educational program, the District Court characterized it and the reporting function as "ministerial [and] lacking ideological content or use." *Id.*,

at 1130. These tasks are not part of the teaching process and cannot "be used to foster an ideological outlook." *Ibid.* Reimbursement for the costs of so complying with state law, therefore, has primarily a secular, rather than a religious, purpose and effect.[5]

IV

The New York statute, unlike the Ohio statute at issue in *Wolman,* provides for direct cash reimbursement to the nonpublic school for administering the state-prescribed examinations and for grading two of them. We agree with the District Court that such reimbursement does not invalidate the New York statute. If the State furnished state-prepared tests, thereby relieving the nonpublic schools of the expense of preparing their own examinations, but left the grading of the tests to the schools, and if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education. But as we have already concluded, grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for perform-

[5] The recordkeeping function, according to the parties' stipulation of facts, involves "collection of data requested from homeroom teachers, pupil personnel services staff, attendance secretaries and administrators; compilation and correlation of data; and filling out and mailing of report." App. 31a. The attendance-taking function is described in similar ministerial terms. *Id.,* at 37a. Of interest is the District Court's finding that "[t]he lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting. According to applications prepared by intervenor-defendant private schools for the 1973–1974 school year, between 85% and 95% of the total reimbursement is accounted for by the costs attributable to attendance-taking, of which all but a negligible portion represents compensation to personnel for this service." 461 F. Supp., at 1126.

ing the grading function. As the District Court observed, "[p]utting aside the question of whether direct financial aid can be administered without excessive entanglement by the State in the affairs of a sectarian institution, there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect." 461 F. Supp., at 1129.

A contrary view would insist on drawing a constitutional distinction between paying the nonpublic school to do the grading and paying state employees or some independent service to perform that task, even though the grading function is the same regardless of who performs it and would not have the primary effect of aiding religion whether or not performed by nonpublic school personnel. In either event, the nonpublic school is being relieved of the cost of grading state-required, state-furnished examinations. We decline to embrace a formalistic dichotomy that bears so little relationship either to common sense or to the realities of school finance. None of our cases requires us to invalidate these reimbursements simply because they involve payments in cash. The Court "has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends." *Hunt* v. *McNair*, 413 U. S. 734, 743 (1973).[6] Because the recordkeeping and

[6] As Mr. Justice Blackmun wrote in *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 747 (1976) (footnote omitted): "The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way." Cf. *New York* v. *Cathedral Academy*, 434 U. S. 125, 134 (1977) ("[T]his Court has never held that freeing

reporting functions also have neither a religious purpose nor a primarily religious effect, we reach the same results with respect to the reimbursements for these services.

Of course, under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services. See *Levitt I*, 413 U. S., at 480; *Committee for Public Education* v. *Nyquist*, 413 U. S., at 774; *Lemon* v. *Kurtzman*, 403 U. S., at 619–622. But here, as we shall see, the New York law provides ample safeguards against excessive or misdirected reimbursement.

V

The District Court recognized that "[w]here a state is required in determining what aid, if any, may be extended to a sectarian school, to monitor the day-to-day activities of the teaching staff, to engage in onerous, direct oversight, or to make on-site judgments from time to time as to whether different school activities are religious in character, the risk of entanglement is too great to permit governmental involvement." 461 F. Supp., at 1130. After examining the New York statute and its operation, however, the District Court concluded that "[t]he activities subsidized under the Statute here at issue . . . do not pose any substantial risk of such entanglement." *Ibid.* (footnote omitted).

The District Court described the process of reimbursement:

> "Schools which seek reimbursement must 'maintain a separate account or system of accounts for the expenses incurred in rendering' the reimbursable services, and they must submit to the N. Y. State Commissioner of Education an application for reimbursement with additional reports and documents prescribed by the Commissioner. . . . Reimbursable costs include proportionate shares of the teachers' salaries and fringe benefits attrib-

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private funds for sectarian uses invalidates otherwise secular aid to religious institutions . . .").

> utable to administration of the examinations and reporting of State-required data on pupil attendance and performance, plus the cost of supplies and other contractual expenditures such as data processing services. Applications for reimbursement cannot be approved until the Commissioner audits vouchers or other documents submitted by the schools to substantiate their claims. . . . The Statute further provides that the State Department of Audit and Control shall from time to time inspect the accounts of recipient schools in order to verify the cost to the schools of rendering the reimbursable services. If the audit reveals that a school has received an amount in excess of its actual costs, the excess must be returned to the State immediately. . . ." *Id.*, at 1126, quoting 1974 N. Y. Laws, ch. 507.

We agree with the District Court that "[t]he services for which the private schools would be reimbursed are discrete and clearly identifiable." 461 F. Supp., at 1131.[7] The reimbursement process, furthermore, is straightforward and susceptible to the routinization that characterizes most reimbursement schemes. On its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith

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[7] As the District Court wrote:

"The services for which the private schools would be reimbursed are discrete and clearly identifiable. A teacher's taking of attendance, administration of examinations, and recordkeeping can hardly be confused with his or her other activities. Although there might be a possibility of fraud or mistake in the records submitted by private schools of the teachers' time spent on such activities, the careful auditing procedures anticipated by § 7 of the Statute should provide an adequate safeguard against inflated claims. In addition, since the services subsidized under the Statute are highly routinized, costs of the services for a given size of class should vary little from school to school, thus enabling the State to check claims filed by private schools against records maintained by hundreds of public schools under State supervision." 461 F. Supp., at 1131 (footnote omitted).

upon which any future excessive entanglement would be predicated.[8]

VI

It is urged that the District Court judgment is unsupportable under *Meek* v. *Pittenger*, 421 U. S. 349 (1975), which is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities. Brief for Appellants 9–11. The difficulty with this position is that a majority of the Court, including the author of *Meek* v. *Pittenger*, upheld in *Wolman* a state statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions, functions that they otherwise would have had to perform themselves and that were intimately connected with the educational processes. Yet the *Wolman* opinion at no point suggested that this holding was inconsistent with the decision in *Meek*. Unless the majority in *Wolman* was silently disavowing *Meek*, in whole or in part, that case was simply not understood by this Court to stand for the broad proposition urged by appellants and espoused by the District Court in *Levitt II*.

That *Meek* was understood more narrowly was suggested by MR. JUSTICE POWELL in his separate opinion in *Wolman:* "I am not persuaded," he said, "nor did *Meek* hold, that all loans

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[8] We find no merit whatever in appellants' argument, which was not made below, that the extent of entanglement here is sufficient to raise the danger of future political divisiveness along religious lines. Brief for Appellants 16–18. *Wolman* was decided without reference to any such potential discord. Moreover, the New York plan reimburses "actual costs." Thus it cannot be maintained that the New York system will provoke religious battles over legislative appropriations, an eventuality that could conceivably occur under a system of state aid involving direct appropriations. Cf. *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 794–798 (1973).

of secular instructional material and equipment" inescapably have the effect of direct advancement of religion. 433 U. S., at 263. And obviously the testing services furnished by the State in *Wolman* were approved on the premise that those services did not and could not have the primary effect of advancing the sectarian aims of the nonpublic schools. With these indicators before it, the District Court properly put the two cases together and sustained the reimbursements involved here because it had been shown with sufficient clarity that they would serve the State's legitimate secular ends without any appreciable risk of being used to transmit or teach religious views.

This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

The judgment of the District Court is

Affirmed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court in this case, I fear, takes a long step backwards in the inevitable controversy that emerges when a state legislature continues to insist on providing public aid to parochial schools.

I thought that the Court's judgments in *Meek* v. *Pittenger*, 421 U. S. 349 (1975), and in *Wolman* v. *Walter*, 433 U. S. 229 (1977) (which the Court concedes, *ante*, at 654, is the controlling authority here), at last had fixed the line between that which is constitutionally appropriate public aid and that which is not. The line necessarily was not a straight one. It could not be, when this Court, on the one hand, in *Everson* v. *Board of Education*, 330 U. S. 1 (1947), by a 5–4 vote, decided that there was no barrier under the First and Fourteenth Amendments to parental reimbursement of the cost of fares for the transportation of children attending parochial schools, and in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), by a 6–3 vote, ruled that New York's lending of approved textbooks to students in private secondary schools was not violative of those Amendments, and yet, on the other hand, in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), struck down, as violative of the Religion Clauses, statutes that, respectively, would have supplemented nonpublic school teachers' salaries and would have authorized the "purchase" of certain "secular educational services" from nonpublic schools, and also in *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973) (*Levitt I*), struck down New York's previous attempt to reimburse nonpublic schools for the expenses of tests and examinations. See also *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), where the Court nullified New York's financial aid programs for "maintenance and repair" of facilities and equipment, a tuition reimbursement plan, and tax relief for parents who did not qualify for tuition reimbursement, and *Sloan* v. *Lemon*, 413 U. S. 825 (1973), where the Court ruled invalid a state plan for parental reimbursement of a portion of nonpublic school tuition expenses. And see *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736 (1976).

But, I repeat, the line, wavering though it may be, was indeed drawn in *Meek* and in *Wolman*, albeit with different

combinations of Justices, those who perceive no barrier under the First and Fourteenth Amendments and who would rule in favor of almost any aid a state legislature saw fit to provide, on the one hand, and those who perceive a broad barrier and would rule against aid of almost any kind, on the other hand, in turn joining Justices in the center on these issues, to make order and a consensus out of the earlier decisions. Now, some of those who joined in *Lemon*, *Levitt I*, *Meek*, and *Wolman* in invalidating, depart and validate. I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of a state legislature is worth a nod of approval.

I

In order properly to analyze the amended school aid plan that the New York Legislature produced in response to its defeat in *Levitt I*, it is imperative, it seems to me, to examine the statute's operational details with great precision and with fewer generalities than the Court does today. One should do more than give a passing glance at selected provisions of the statute, and one should not ignore the considerations that prompted the three-judge District Court initially and *unanimously* to hold New York's revised plan to be unconstitutional, *Committee for Public Education* v. *Levitt*, 414 F. Supp. 1174 (SDNY 1976) (*Levitt II*), and that prompted Judge Ward, in his persuasive dissent in *Levitt III*, *Committee for Public Education* v. *Levitt*, 461 F. Supp. 1123 (SDNY 1978), after our remand, to differ so vigorously with his two colleagues who meanwhile changed their minds, mistakenly in my view.

II

The Court, *ante*, at 653, and all three judges of the District Court, 461 F. Supp., at 1126, 1131, n. 1, are correct, of course, in recognizing that the "mode of analysis for Establishment

Clause questions is defined by the three-part test that has emerged from the Court's decisions." *Wolman* v. *Walter*, 433 U. S., at 235–236 (plurality opinion). To pass constitutional muster under this test, the New York statute now challenged, Chapter 507, 1974 N. Y. Laws, as amended, "must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." 433 U. S., at 236.

I have no trouble in agreeing with the Court that Chapter 507 manifests a clear secular purpose. See *Levitt I*, 413 U. S., at 479, n. 7. I therefore would evaluate Chapter 507 under the two remaining inquiries of the three-part test.

In deciding whether Chapter 507 has an impermissible primary effect of advancing religion, or whether it fosters excessive government entanglement with sectarian affairs, one must keep in focus the nature of the assistance prescribed by the New York statute. The District Court found that $8–$10 million annually would be expended under Chapter 507, with the great majority of these funds going to sectarian schools to pay for personnel costs associated with attendance reporting. The court found that such payments would amount to from 1% to 5.4% of the personnel budget of an individual religious school receiving assistance under Chapter 507. Moreover, Chapter 507 provides direct cash payments by the State of New York to religious schools, as opposed to providing services or providing cash payments to third parties who have rendered services. And the money paid sectarian schools under Chapter 507 is designated to reimburse costs that are incurred by religious schools in order to meet basic state testing and reporting requirements, costs that would have been incurred regardless of the availability of reimbursement from the State.

This direct financial assistance provided by Chapter 507 differs significantly from the types of state aid to religious schools approved by the Court in *Wolman* v. *Walter*. For

example, in *Wolman* the Court approved that portion of the Ohio statute that provided to religious schools the standardized tests and scoring services furnished to public schools. But, unlike New York's Chapter 507, Ohio's statute provided only the tests themselves and scoring by employees of neutral testing organizations. It did not authorize direct financial aid of any type to religious schools. *Wolman* v. *Walter*, 433 U. S., at 238–239, and n. 7 (plurality opinion).

Similarly, the other forms of assistance upheld in *Wolman* did not involve direct cash assistance. Rather, the Court approved the State's providing sectarian school students therapeutic, remedial, and guidance programs administered by public employees on public property. It also approved certain public health services furnished by public employees to religious school pupils, even though administered in part on the sectarian premises, on the basis of its recognition in a number of cases, see, *e. g.*, *Meek* v. *Pittenger*, 421 U. S., at 364, 368, n. 17, that provision of health services to all schoolchildren does not advance religion so as to contravene the Establishment Clause. 433 U. S., at 241–248. And it upheld the lending by Ohio of textbooks to pupils under the "unique presumption," *id.*, at 252, n. 18, created by *Board of Education* v. *Allen*, 392 U. S. 236 (1968), and reaffirmed since that time. *E. g.*, *Meek* v. *Pittenger*, 421 U. S., at 359–362 (plurality opinion); *id.*, at 388 (opinion concurring in judgment in part and dissenting in part).

It is clear, however, that none of the programs upheld in *Wolman* provided direct financial support to sectarian schools. At the very least, then, the Court's holding today goes further in approving state assistance to sectarian schools than the Court had gone in past decisions. But beyond merely failing to approve the type of direct financial aid at issue in this case, *Wolman* reaffirmed the finding of the Court in *Meek* v. *Pittenger* that *direct* aid to the educational function of religious schools necessarily advances the sectarian enterprise as a whole.

Thus, the Court in *Wolman* invalidated Ohio's practice of loaning instructional materials directly to sectarian schools, "even though the loan ostensibly was limited to neutral and secular instructional material and equipment, [because] it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." 433 U. S., at 250. In the same vein, the Court disapproved Ohio's provision of field-trip transportation directly to religious schools as impermissible direct aid that, because of the pervasively religious nature of the schools involved, furthered the religious goals of the schools, and that also required government surveillance of expenditures to such a degree as to foster entanglement of the State in religion. *Id.*, at 252–255.

Wolman thus re-enforces the conclusion that substantial direct financial aid to a religious school, even though ostensibly for secular purposes, runs the great risk of furthering the religious mission of the school as a whole because that religious mission so pervades the functioning of the school. The Court specifically recognized this in *Meek:*

> "[F]aced with the substantial amounts of direct support authorized by [the statute at issue], it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion. *Hunt* v. *McNair*, 413 U. S. 734, 743." 421 U. S., at 365–366.

See *Wolman* v. *Walter*, 433 U. S., at 249–250; *Committee for Public Education* v. *Nyquist*, 413 U. S., at 781–783, and n. 39.

Under the principles announced in these decided cases, I am compelled to conclude that Chapter 507, by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion. The vast majority of the schools aided under Chapter 507 typify the religious-pervasive institution the very purpose of which is to provide an integrated secular and sectarian education. The aid provided by Chapter 507 goes primarily to reimburse such schools for personnel costs incurred in complying with state reporting and testing requirements, costs that must be incurred if the school is to be accredited to provide a combined sectarian-secular education to school-age pupils. To continue to function as religious schools, sectarian schools thus are required to incur the costs outlined in § 3 of Chapter 507, or else lose accreditation by the State of New York. See, *e. g.*, N. Y. Educ. Law §§ 3210, 3211 (McKinney 1970). These reporting and testing requirements would be met by the schools whether reimbursement were available or not. As such, the attendance, informational, and testing expenses compensated by Chapter 507 are essential to the overall educational functioning of sectarian schools in New York in the same way instruction in secular subjects is essential. Therefore, just as direct aid for ostensibly secular purposes by provision of instructional materials or direct financial subsidy is forbidden by the Establishment Clause, so direct aid for the performance of recordkeeping and testing activities that are an essential part of the sectarian school's functioning also is interdicted. The Court stated in *Meek*, and reaffirmed in *Wolman*:

> "The very purpose of many [religious] schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. See *Lemon* v. *Kurtzman*, 403 U. S., at 616–617. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as

a whole. '[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' *Id.*, at 657 (opinion of BRENNAN, J.)." 421 U. S., at 366, quoted in 433 U. S., at 249–250.

It is also true that the keeping of pupil attendance records is essential to the religious mission of sectarian schools. To ensure that the school is fulfilling its religious mission properly, it is necessary to provide a way to determine whether pupils are attending the sectarian classes required of them. Accordingly, Chapter 507 not only advances religion by aiding the educational mission of the sectarian school as a whole; it also subsidizes directly the religious mission of such schools. Chapter 507 makes no attempt, and none is possible, to separate the portion of the overall expense of attendance-taking attributable to the desire to ensure that students are attending religious instruction from that portion attributable to the desire to ensure that state attendance laws are complied with. This type of direct aid the Establishment Clause does not permit. *Committee for Public Education* v. *Nyquist,* 413 U. S., at 774–780; *Levitt I,* 413 U. S., at 480.

I thus would hold that the aid provided by Chapter 507 constitutes a direct subsidy of the operating costs of the sectarian school that aids the school as a whole, and that the statute therefore directly advances religion in violation of the Establishment Clause of the First Amendment.

III

Beyond this, Chapter 507 also fosters government entanglement with religion to an impermissible extent. Unlike *Wolman,* under Chapter 507 sectarian employees are compensated by the State for grading examinations. In some cases, such grading requires the teacher to exercise subjective judgment. For the State properly to ensure that judgment is

not exercised to inculcate religion, a "comprehensive, discriminating, and continuing state surveillance will inevitably be required." *Lemon* v. *Kurtzman*, 403 U. S., at 619.

Moreover, Chapter 507 provides for continuing reimbursement with regard to examinations in which the questions may vary from year to year, and for examinations that may be offered in the future. This will require the State continually to evaluate the examinations to ensure that reimbursement for expenses incurred in connection with their administration and grading will not offend the First Amendment. This, too, fosters impermissible government involvement in sectarian affairs, since it is likely to lead to continuing adjudication of disputes between the State and others as to whether certain questions or new examinations present such opportunities for the advancement of religion that reimbursement for administering and grading them should not be permitted. Cf. *New York* v. *Cathedral Academy*, 434 U. S. 125 (1977).

Finally, entanglement also is fostered by the system of reimbursement for personnel expenses. The State must make sure that it reimburses sectarian schools only for those personnel costs attributable to the sectarian employees' secular activities described in § 3 of Chapter 507. It is difficult to see how the State adequately may discover whether the time for which reimbursement is made available was devoted only to secular activities without some type of ongoing surveillance of the sectarian employees and religious schools at issue. It is this type of extensive entanglement that the Establishment Clause forbids. *Lemon* v. *Kurtzman*, 403 U. S., at 617–621. I fail to see, and I am uncomfortable with, the so-called "ample safeguards," *ante*, at 659, upon which the Court and the District Court's majority, *Levitt III*, 461 F. Supp., at 1131, are content to rest so assured.

I therefore conclude that Chapter 507 has a primary effect of advancing religion and also fosters excessive government entanglement with religion. The statute, consequently, is unconstitutional under the Establishment Clause,

at least to the extent it provides reimbursement directly to sectarian nonpublic schools.

I would reverse the judgment of the District Court.

MR. JUSTICE STEVENS, dissenting.

Although I agree with MR. JUSTICE BLACKMUN's demonstration of why today's holding is not compelled by precedent, my vote also rests on a more fundamental disagreement with the Court. The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools. In groping for a rationale to support today's decision, the Court has taken a position that could equally be used to support a subsidy to pay for staff time attributable to conducting fire drills or even for constructing and maintaining fireproof premises in which to conduct classes. Though such subsidies might represent expedient fiscal policy, I firmly believe they would violate the Establishment Clause of the First Amendment.

The Court's adoption of such a position confirms my view, expressed in *Wolman* v. *Walter*, 433 U. S. 229, 264 (STEVENS, J., concurring in part and dissenting in part), and *Roemer* v. *Maryland Public Works Bd.*, 426 U. S. 736, 775 (STEVENS, J., dissenting), that the entire enterprise of trying to justify various types of subsidies to nonpublic schools should be abandoned. Rather than continuing with the sisyphean task of trying to patch together the "blurred, indistinct, and variable barrier" described in *Lemon* v. *Kurtzman*, 403 U. S. 602, 614, I would resurrect the "high and impregnable" wall between church and state constructed by the Framers of the First Amendment. See *Everson* v. *Board of Education*, 330 U. S. 1, 18.

NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 78-857. Argued October 10, 1979—Decided February 20, 1980*

Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board), seeking certification as bargaining agent for the full-time faculty members of certain schools of Yeshiva University, a private university. The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act). The evidence at hearings before the Board's hearing officer showed, *inter alia*, that a central administrative hierarchy serves all of the University's schools, with University-wide policies being formulated by the central administration upon approval of the Board of Trustees. However, the individual schools within the University are substantially autonomous, and the faculty members at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules. Also, the overwhelming majority of faculty recommendations as to faculty hiring, tenure, sabbaticals, termination, and promotion are implemented. The Board granted the Union's petition and directed an election. Summarily rejecting the University's contention that its faculty members are managerial employees, the Board held that the faculty members are professional employees entitled to the Act's protection. After the Union won the election and was certified, the University refused to bargain. In subsequent unfair labor practice proceedings, the Board ordered the University to bargain and sought enforcement in the Court of Appeals, which denied the petition. The court agreed that the faculty members are professional employees under § 2 (12) of the Act, found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as its "crucial role . . . in determining other central policies of the institution," and accordingly held that the faculty members are endowed with "managerial status" sufficient to remove them from the Act's coverage.

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*Together with No. 78-997, *Yeshiva University Faculty Assn.* v. *Yeshiva University*, also on certiorari to the same court.

Held: The University's full-time faculty members are managerial employees excluded from the Act's coverage. Pp. 679–691.

(a) The authority structure of a university does not fit neatly into the statutory scheme, because authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. The absence of explicit congressional direction does not preclude the Board from reaching any particular type of employment, and the Board has approved the formation of bargaining units composed of faculty members on the ground that they are "professional employees" under § 2 (12) of the Act. Nevertheless professionals may be exempted from coverage under the judicially implied exclusion for "managerial employees" when they are involved in developing and implementing employer policy. Pp. 679–682.

(b) Here, application of the managerial exclusion to the University's faculty members is not precluded on the theory that they are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance and to pursue professional values rather than institutional interests. The controlling consideration is that the faculty exercises authority which in any other context unquestionably would be managerial, its authority in academic matters being absolute. The faculty's professional interests—as applied to governance at a university like Yeshiva which depends on the professional judgment of its faculty to formulate and apply policies—cannot be separated from those of the institution, and thus it cannot be said that a faculty member exercising independent judgment acts primarily in his own interest and does not represent the interest of his employer. Pp. 682–690.

(c) The deference ordinarily due the Board's expertise does not require reversal of the Court of Appeals' decision. This Court respects the Board's expertise when its conclusions are rationally based on articulated facts and consistent with the Act, but here the Board's decision satisfies neither criterion. P. 691.

582 F. 2d 686, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, REHNQUIST, and STEVENS, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which WHITE, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 691.

Norton J. Come argued the cause for petitioner in No. 78–857. With him on the briefs were *Solicitor General McCree, Deputy Solicitor General Wallace, Stephen M. Shapiro, John*

S. Irving, Robert E. Allen, Linda Sher, and *David S. Fishback. Ronald H. Shechtman* argued the cause for petitioner in No. 78–997. With him on the brief was *Murray A. Gordon.*

Marvin E. Frankel argued the cause for respondent in both cases. With him on the brief were *Saul G. Kramer, Mark L. Goldstein,* and *Gerald A. Bodner.*†

MR. JUSTICE POWELL delivered the opinion of the Court.

Supervisors and managerial employees are excluded from the categories of employees entitled to the benefits of collective bargaining under the National Labor Relations Act.[1] The question presented is whether the full-time faculty of Yeshiva University fall within those exclusions.

I

Yeshiva is a private university which conducts a broad range of arts and sciences programs at its five undergraduate and eight graduate schools in New York City. On October 30, 1974, the Yeshiva University Faculty Association (Union) filed a representation petition with the National Labor Relations Board (Board). The Union sought certification as bargaining agent for the full-time faculty members at 10 of the 13

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† Briefs of *amici curiae* urging reversal were filed by *Woodley B. Osborne, Victor J. Stone,* and *Robert A. Goldstein* for the American Association of University Professors; and by *Donald H. Wollett* and *Robert H. Chanin* for the National Education Association.

Briefs of *amici curiae* urging affirmance were filed by *Estelle A. Fishbein, Fred Vinson, Daniel Riesel,* and *David Sive* for Johns Hopkins University et al.; and by *Kenneth C. McGuiness, Robert E. Williams,* and *Daniel R. Levinson* for the National Society of Professional Engineers.

Lawrence A. Poltrock filed a brief in No. 78–857 for the American Federation of Teachers, AFL–CIO, as *amicus curiae.*

[1] 49 Stat. 449, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151 *et seq.*; see 29 U. S. C. §§ 152 (3), 152 (11), 164 (a); *NLRB* v. *Bell Aerospace Co.,* 416 U. S. 267 (1974).

schools.[2] The University opposed the petition on the ground that all of its faculty members are managerial or supervisory personnel and hence not employees within the meaning of the National Labor Relations Act (Act). A Board-appointed hearing officer held hearings over a period of five months, generating a voluminous record.

The evidence at the hearings showed that a central administrative hierarchy serves all of the University's schools. Ultimate authority is vested in a Board of Trustees, whose members (other than the President) hold no administrative positions at the University. The President sits on the Board of Trustees and serves as chief executive officer, assisted by four Vice Presidents who oversee, respectively, medical affairs and science, student affairs, business affairs, and academic affairs. An Executive Council of Deans and administrators makes recommendations to the President on a wide variety of matters.

University-wide policies are formulated by the central administration with the approval of the Board of Trustees, and include general guidelines dealing with teaching loads, salary scales, tenure, sabbaticals, retirement, and fringe benefits. The budget for each school is drafted by its Dean or Director, subject to approval by the President after consultation with a committee of administrators.[3] The faculty participate

[2] The schools involved are Yeshiva College, Stern College for Women, Teacher's Institute for Women, Erna Michael College, Yeshiva Program, James Striar School of General Jewish Studies, Belfer Graduate School of Sciences, Ferkauf Graduate School of Humanities and Social Sciences, Wurzweiler School of Social Work, and Bernard Revel Graduate School. The Union did not seek to represent the faculty of the medical school, the graduate school of medical sciences, the Yeshiva High School, or any of the theological programs affiliated with the University. A law school has been opened since the time of the hearings, but it does not figure in this case.

[3] At Yeshiva College, budget requests prepared by the senior professor in each subject area receive the "perfunctory" approval of the Dean "99 percent" of the time and have never been rejected by the central administration. App. 298–299. A council of elected department chairmen at

in University-wide governance through their representatives on an elected student-faculty advisory council. The only University-wide faculty body is the Faculty Review Committee, composed of elected representatives who adjust grievances by informal negotiation and also may make formal recommendations to the Dean of the affected school or to the President. Such recommendations are purely advisory.

The individual schools within the University are substantially autonomous. Each is headed by a Dean or Director, and faculty members at each school meet formally and informally to discuss and decide matters of institutional and professional concern. At four schools, formal meetings are convened regularly pursuant to written bylaws. The remaining faculties meet when convened by the Dean or Director. Most of the schools also have faculty committees concerned with special areas of educational policy. Faculty welfare committees negotiate with administrators concerning salary and conditions of employment. Through these meetings and committees, the faculty at each school effectively determine its curriculum, grading system, admission and matriculation standards, academic calendars, and course schedules.[4]

Ferkauf approves the school's budget allocations when discretionary funds are available. *Id.*, at 626–627. All of these professors were included in the bargaining unit approved by the Board.

[4] For example, the Deans at Yeshiva and Erna Michael Colleges regard faculty actions as binding. *Id.*, at 248–249, 312–313. Administrators testified that no academic initiative of either faculty had been vetoed since at least 1968. *Id.*, at 250, 313. When the Stern College faculty disagreed with the Dean's decision to delete the education major, the major was reinstituted. *Id.*, at 191. The Director of the Teacher's Institute for Women testified that "the faculty is the school," *id*, at 379, while the Director of the James Striar School described his position as the "executive arm of the faculty," which had overruled him on occasion, *id.*, at 360–361. All decisions regarding academic matters at the Yeshiva Program and Bernard Revel are made by faculty consensus. *Id.*, at 574, 583–586. The "internal operation of [Wurzweiler] has been heavily governed by faculty decisions," according to its Dean. *Id.*, at 502.

Faculty power at Yeshiva's schools extends beyond strictly academic concerns. The faculty at each school make recommendations to the Dean or Director in every case of faculty hiring, tenure, sabbaticals, termination and promotion. Although the final decision is reached by the central administration on the advice of the Dean or Director, the overwhelming majority of faculty recommendations are implemented.[5] Even when financial problems in the early 1970's restricted Yeshiva's budget, faculty recommendations still largely controlled personnel decisions made within the constraints imposed by the administration. Indeed, the faculty of one school recently drew up new and binding policies expanding their own role in these matters. In addition, some faculties make final decisions regarding the admission, expulsion, and graduation of individual students. Others have decided questions involving teaching loads, student absence policies, tuition and enrollment levels, and in one case the location of a school.[6]

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[5] One Dean estimated that 98% of faculty hiring recommendations were ultimately given effect. *Id.*, at 624. Others could not recall an instance when a faculty recommendation had been overruled. *Id.*, at 193–194. At Stern College, the Dean in six years has never overturned a promotion decision. *Ibid.* The President has accepted all decisions of the Yeshiva College faculty as to promotions and sabbaticals, including decisions opposed by the Dean. *Id.*, at 268–270. At Erna Michael, the Dean has never hired a full-time faculty member without the consent of the affected senior professor, *id.*, at 333–335, and the Director of Teacher's Institute for Women stated baldly that no teacher had ever been hired if "there was the slightest objection, even on one faculty member's part." *Id.*, at 388. The faculty at both these schools have overridden recommendations made by the deans. No promotion or grant of tenure has ever been made at Ferkauf over faculty opposition. *Id.*, at 620, 633. The Dean of Belfer testified that he had no right to override faculty decisions on tenure and nonrenewal. *Id.*, at 419.

[6] The Director of Teacher's Institute for Women once recommended that the school move to Brooklyn to attract students. The faculty rejected the proposal and the school remained in Manhattan. *Id.*, at 379–380.

II

A three-member panel of the Board granted the Union's petition in December 1975, and directed an election in a bargaining unit consisting of all full-time faculty members at the affected schools. 221 N. L. R. B. 1053. The unit included Assistant Deans, senior professors, and department chairmen, as well as associate professors, assistant professors, and instructors.[7] Deans and Directors were excluded. The Board summarily rejected the University's contention that its entire faculty are managerial, viewing the claim as a request for reconsideration of previous Board decisions on the issue. Instead of making findings of fact as to Yeshiva, the Board referred generally to the record and found no "significan[t]" difference between this faculty and others it had considered. The Board concluded that the faculty are professional employees entitled to the protection of the Act because "faculty participation in collegial decision making is on a collective rather than individual basis, it is exercised in the faculty's own interest rather than 'in the interest of the employer,' and final authority rests with the board of trustees." *Id.*, at 1054 (footnote omitted).[8]

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[7] "Full-time faculty" were defined as those

"appointed to the University in the titles of professor, associate professor, assistant professor, instructor, or any adjunct or visiting thereof, department chairmen, division chairmen, senior faculty and assistant deans, but excluding . . . part-time faculty; lecturers; principal investigators; deans, acting deans and directors; [and others not relevant to this action]." 221 N. L. R. B., at 1057.

The term "faculty" in this opinion refers to the members of this unit as defined by the Board.

[8] Identical language had been employed in at least two other Board decisions. See *infra*, at 684–685. In this case, it was not supported by a single citation to the record. MR. JUSTICE BRENNAN's dissent relies on this language, *post*, at 696, and adds that a faculty's "primary concerns are academic and relate solely to its own professional reputation," *post*, at 701. The view that faculty governance authority "is exercised in the

The Union won the election and was certified by the Board. The University refused to bargain, reasserting its view that the faculty are managerial. In the subsequent unfair labor practice proceeding, the Board refused to reconsider its holding in the representation proceeding and ordered the University to bargain with the Union. 231 N. L. R. B. 597 (1977). When the University still refused to sit down at the negotiating table, the Board sought enforcement in the Court of Appeals for the Second Circuit, which denied the petition. 582 F. 2d 686 (1978).

Since the Board had made no findings of fact, the court examined the record and related the circumstances in considerable detail. It agreed that the faculty are professional employees under § 2 (12) of the Act. 29 U. S. C. § 152 (12). But the court found that the Board had ignored "the extensive control of Yeshiva's faculty" over academic and personnel decisions as well as the "crucial role of the full-time faculty in determining other central policies of the institution." 582 F. 2d, at 698. The court concluded that such power is not an exercise of individual professional expertise. Rather, the faculty are, "in effect, substantially and pervasively operating the enterprise." *Ibid.* Accordingly, the court held that the faculty are endowed with "managerial status" sufficient to remove them from the coverage of the Act. We granted certiorari, 440 U. S. 906 (1979), and now affirm.

III

There is no evidence that Congress has considered whether a university faculty may organize for collective bargaining under the Act. Indeed, when the Wagner and Taft-Hartley Acts were approved, it was thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not "affect com-

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faculty's own interest" rather than that of the University assumes a lack of responsibility that certainly is not reflected in this record.

merce." See *NLRB* v. *Catholic Bishop of Chicago*, 440 U. S. 490, 504–505 (1979).[9] Moreover, the authority structure of a university does not fit neatly within the statutory scheme we are asked to interpret. The Board itself has noted that the concept of collegiality "does not square with the traditional authority structures with which th[e] Act was designed to cope in the typical organizations of the commercial world." *Adelphi University*, 195 N. L. R. B. 639, 648 (1972).

The Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry. *Ibid.* In contrast, authority in the typical "mature" private university is divided between a central administration and one or more collegial bodies. See J. Baldridge, Power and Conflict in the University 114 (1971). This system of "shared authority" evolved from the medieval model of collegial decisionmaking in which guilds of scholars were responsible only to themselves. See N. Fehl, The Idea of a University in East and West 36–46 (1962); D. Knowles, The Evolution of Medieval Thought 164–168 (1962). At early universities, the faculty were the school. Although faculties have been subject to external control in the United States since colonial times, J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1976, pp. 25–30 (3d ed. 1976), traditions of collegiality continue to play a significant role at many universities, including Yeshiva.[10] For these reasons, the Board has

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[9] See also S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935) (dispute between employer and college professor would not be covered); H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 36 (1947) (listing professional employees covered by new statutory provision without mentioning teachers); S. Rep. No. 105, 80th Cong., 1st Sess., 11, 19 (1947) (same).

[10] See the inaugural address of Williams College President Paul Ansel Chadbourne, quoted in Kahn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 UCLA L. Rev. 63, 70, n. 16 (1973) (" 'Professors are sometimes spoken of as working for the college. They *are* the college' ") (emphasis in original); Davis, Unions

recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *Syracuse University*, 204 N. L. R. B. 641, 643 (1973).

The absence of explicit congressional direction, of course, does not preclude the Board from reaching any particular type of employment. See *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 124–131 (1944). Acting under its responsibility for adapting the broad provisions of the Act to differing workplaces, the Board asserted jurisdiction over a university for the first time in 1970. *Cornell University*, 183 N. L. R. B. 329 (1970). Within a year it had approved the formation of bargaining units composed of faculty members. *C. W. Post Center*, 189 N. L. R. B. 904 (1971).[11] The Board reasoned that faculty members are "professional employees" within the meaning of § 2 (12) of the Act and therefore are entitled to the benefits of collective bargaining. 189 N. L. R. B., at 905; 29 U. S. C. § 152 (12).[12]

Yeshiva does not contend that its faculty are not professionals under the statute. But professionals, like other employees, may be exempted from coverage under the Act's ex-

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and Higher Education: Another View, 49 Ed. Record 139, 143 (1968) ("The president . . . is not the faculty's master. He is as much the faculty's administrator as he is the board [of trustees']"); n. 4, *supra*.

[11] The Board has suggested that Congress tacitly approved the formation of faculty units in 1974, when the Act was amended to eliminate the exemption accorded to nonprofit hospitals. Although Congress appears to have agreed that nonprofit institutions "affect commerce" under modern economic conditions, H. R. Rep. No. 93–1051, p. 4 (1974); 120 Cong. Rec. 12938 (1974) (remarks of Sen. Williams), there is nothing to suggest that Congress considered the status of university faculties.

[12] The Act provides broadly that "employees" have organizational and other rights. 29 U. S. C. § 157. Section 2 (3) defines "employee" in general terms, 29 U. S. C. § 152 (3); § 2 (12) defines "professional employee" in some detail, 29 U. S. C. § 152 (12); and § 9 (b) (1) prohibits the Board from creating a bargaining unit that includes both professional and nonprofessional employees unless a majority of the professionals vote for inclusion, 29 U. S. C. § 159 (b) (1).

clusion for "supervisors" who use independent judgment in overseeing other employees in the interest of the employer,[13] or under the judicially implied exclusion for "managerial employees" who are involved in developing and enforcing employer policy.[14] Both exemptions grow out of the same concern: That an employer is entitled to the undivided loyalty of its representatives. *Beasley* v. *Food Fair of North Carolina*, 416 U. S. 653, 661–662 (1974); see *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 281–282 (1974). Because the Court of Appeals found the faculty to be managerial employees, it did not decide the question of their supervisory status. In view of our agreement with that court's application of the managerial exclusion, we also need not resolve that issue of statutory interpretation.

IV

Managerial employees are defined as those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " *NLRB* v. *Bell Aerospace Co.*, *supra*, at 288 (quoting *Palace Laundry Dry Cleaning Corp.*, 75 N. L. R. B. 320, 323, n. 4 (1947)). These employees are "much higher in the managerial structure" than those explicitly mentioned by Congress, which "regarded [them] as so clearly outside the Act that no specific exclusionary provision was thought necessary." 416 U. S., at 283.

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[13] An employee may be excluded if he has authority over any one of 12 enumerated personnel actions, including hiring and firing. 29 U. S. C. §§ 152 (3), 152 (11), 164 (a). The Board has held repeatedly that professionals may be excluded as supervisors. *E. g.*, *University of Vermont*, 223 N. L. R. B. 423, 426 (1976); *Presbyterian Medical Center*, 218 N. L. R. B. 1266, 1267–1269 (1975).

[14] *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974). The Board never has doubted that the managerial exclusion may be applied to professionals in a proper case. *E. g.*, *Sutter Community Hospitals of Sacramento*, 227 N. L. R. B. 181, 193 (1976); see *General Dynamics Corp.*, 213 N. L. R. B. 841, 857–858 (1974); *Westinghouse Electric Corp.*, 113 N. L. R. B. 337, 339 (1955).

Managerial employees must exercise discretion within, or even independently of, established employer policy and must be aligned with management. See *id.*, at 286–287 (citing cases). Although the Board has established no firm criteria for determining when an employee is so aligned, normally an employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.[15]

The Board does not contend that the Yeshiva faculty's decisionmaking is too insignificant to be deemed managerial.[16] Nor does it suggest that the role of the faculty is merely advisory and thus not managerial.[17] Instead, it contends that the managerial exclusion cannot be applied in a straightforward fashion to professional employees because those em-

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[15] *E. g., Sutter Community Hospitals of Sacramento, supra,* at 193; *Bell Aerospace,* 219 N. L. R. B. 384, 385–386 (1975) (on remand); *General Dynamics Corp., supra,* at 857; see *NLRB* v. *Bell Aerospace Co., supra,* at 274, 286–289.

[16] The Board has found decisions of far less significance to the employer to be managerial when the affected employees were aligned with management. *Swift & Co.,* 115 N. L. R. B. 752, 753 (1956) (procurement drivers who made purchases for employers); *Firestone Tire & Rubber Co.,* 112 N. L. R. B. 571, 573 (1955) (production schedulers); *Peter Kiewit Sons' Co.,* 106 N. L. R. B. 194, 196 (1953) (lecturers who indoctrinated new employees); *Western Electric Co.,* 100 N. L. R. B. 420, 423 (1952) (personnel investigators who made hiring recommendations); *American Locomotive Co.,* 92 N. L. R. B. 115, 116–117 (1950) (buyers who made substantial purchases on employer's behalf).

[17] The Union does argue that the faculty's authority is merely advisory. But the fact that the administration holds a rarely exercised veto power does not diminish the faculty's effective power in policymaking and implementation. See nn. 4, 5, *supra.* The statutory definition of "supervisor" expressly contemplates that those employees who "effectively . . . recommend" the enumerated actions are to be excluded as supervisory. 29 U. S. C. § 152 (11). Consistent with the concern for divided loyalty, the relevant consideration is effective recommendation or control rather than final authority. That rationale applies with equal force to the managerial exclusion.

ployees often appear to be exercising managerial authority when they are merely performing routine job duties. The status of such employees, in the Board's view, must be determined by reference to the "alignment with management" criterion. The Board argues that the Yeshiva faculty are not aligned with management because they are expected to exercise "independent professional judgment" while participating in academic governance, and because they are neither "expected to conform to management policies [nor] judged according to their effectiveness in carrying out those policies." Because of this independence, the Board contends there is no danger of divided loyalty and no need for the managerial exclusion. In its view, union pressure cannot divert the faculty from adhering to the interests of the university, because the university itself expects its faculty to pursue professional values rather than institutional interests. The Board concludes that application of the managerial exclusion to such employees would frustrate the national labor policy in favor of collective bargaining.

This "independent professional judgment" test was not applied in the decision we are asked to uphold. The Board's opinion relies exclusively on its previous faculty decisions for both legal and factual analysis. 221 N. L. R. B., at 1054. But those decisions only dimly foreshadow the reasoning now proffered to the Court. Without explanation, the Board initially announced two different rationales for faculty cases,[18]

[18] Two cases simply announced that faculty authority is neither managerial nor supervisory because it is exercised collectively. *C. W. Post Center*, 189 N. L. R. B. 904, 905 (1971); *Fordham University*, 193 N. L. R. B. 134, 135 (1971). The Board later acknowledged that "a genuine system of collegiality would tend to confound us," but held that the modern university departs from that system because "ultimate authority" is vested in a board of trustees which neither attempts to convert the faculty into managerial entities nor advises them to advocate management interests. *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). See *Fairleigh Dickinson University*, 227 N. L. R. B. 239, 241 (1976).

then quickly transformed them into a litany to be repeated in case after case: (i) faculty authority is collective, (ii) it is exercised in the faculty's own interest rather than in the interest of the university, and (iii) final authority rests with the board of trustees. *Northeastern University*, 218 N. L. R. B. 247, 250 (1975); *University of Miami*, 213 N. L. R. B. 634, 634 (1974); see *Tusculum College*, 199 N. L. R. B. 28, 30 (1972).[19] In their arguments in this case, the Board's lawyers have abandoned the first and third branches of this analysis,[20] which in any event were flatly inconsistent with its precedents,[21] and have transformed the second into a theory that does not appear clearly in any Board opinion.[22]

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[19] Citing these three factors, the Board concludes in each case that faculty are professional employees. It has never explained the reasoning connecting the premise with the conclusion, although an argument similar to that made by its lawyers in this case appears in one concurring opinion. *Northeastern University*, 218 N. L. R. B., at 257 (opinion of Member Kennedy).

[20] Although the Board has preserved the points in footnotes to its brief, it no longer contends that "collective authority" and "lack of ultimate authority" are legal rationales. They are now said to be facts which, respectively, "fortif[y]" the Board's view that faculty members act in their own interest, and contradict the premise that the university is a "self-governing communit[y] of scholars." Reply Brief for Petitioner in No. 78–857, p. 11, n. 8. Cf. n. 8, *supra*.

[21] The "collective authority" branch has never been applied to supervisors who work through committees. *E. g.*, *Florida Southern College*, 196 N. L. R. B. 888, 889 (1972). Nor was it thought to bar managerial status for employees who owned enough stock to give them, as a group, a substantial voice in the employer's affairs. See *Sida of Hawaii, Inc.*, 191 N. L. R. B. 194, 195 (1971); *Red and White Airway Cab Co.*, 123 N. L. R. B. 83, 85 (1959); *Brookings Plywood Corp.*, 98 N. L. R. B. 794, 798–799 (1952). Ultimate authority, the third branch, has never been thought to be a prerequisite to supervisory or managerial status. Indeed, it could not be since every corporation vests that power in its board of directors.

[22] We do not, of course, substitute counsel's *post hoc* rationale for the reasoning supplied by the Board itself. *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947). Because the first and third branches of the Board's

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The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.[23]

The Board nevertheless insists that these decisions are not managerial because they require the exercise of independent professional judgment. We are not persuaded by this argument. There may be some tension between the Act's exclusion of managerial employees and its inclusion of professionals, since most professionals in managerial positions continue to draw on their special skills and training. But we have been directed to no authority suggesting that that tension can be resolved by reference to the "independent professional judgment" cri-

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analysis are insupportable, the Board's only colorable theory is the "interest of the employer" branch. The argument presented to us is an expanded and considerably refined version of that notion.

[23] The record shows that faculty members at Yeshiva also play a predominant role in faculty hiring, tenure, sabbaticals, termination and promotion. See *supra*, at 677, and n. 5. These decisions clearly have both managerial and supervisory characteristics. Since we do not reach the question of supervisory status, we need not rely primarily on these features of faculty authority.

terion proposed in this case.[24] Outside the university context, the Board routinely has applied the managerial and supervisory exclusions to professionals in executive positions without inquiring whether their decisions were based on management policy rather than professional expertise.[25] Indeed, the Board has twice implicitly rejected the contention that decisions based on professional judgment cannot be managerial.[26] Since the Board does not suggest that the "independent professional judgment" test is to be limited to university faculty, its new approach would overrule *sub silentio* this body of Board precedent and could result in the indiscriminate recharacterization as covered employees of professionals working in supervisory and managerial capacities.

Moreover, the Board's approach would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not

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[24] The Board has cited no case directly applying an "independent professional judgment" standard. On the related question of accountability for implementation of management policies, it cites only *NLRB* v. *Fullerton Publishing Co.*, 283 F. 2d 545, 550 (CA9 1960), which held that a news editor "responsibly directed" his department so as to fall within the definition of a supervisor, 29 U. S. C. § 152 (11). The court looked in part to accountability in rejecting the claim that the editor merely relayed assignments and thus was not "responsible" for directing employees as required by the statute. The case did not involve the managerial exclusion and has no application to the issues before us.

[25] See cases cited in nn. 13 and 14, *supra*. A strict "conformity to management policy" test ignores the dual nature of the managerial role, since managers by definition not only conform to established policies but also exercise their own judgment within the range of those policies. See *Bell Aerospace*, 219 N. L. R. B., at 385 (quoting *Eastern Camera & Photo Corp.*, 140 N. L. R. B. 569, 571 (1963)).

[26] *University of Chicago Library*, 205 N. L. R. B. 220, 221–222, 229 (1973), enf'd, 506 F. 2d 1402 (CA7 1974) (reversing an Administrative Law Judge's decision which had been premised on the "professional judgment" rationale); *Sutter Community Hospitals of Sacramento*, 227 N. L. R. B., at 193 (excluding as managerial a clinical specialist who used interdisciplinary professional skills to run a hospital department).

divide their loyalty between employer and union. In arguing that a faculty member exercising independent judgment acts primarily in his own interest and therefore does not represent the interest of his employer, the Board assumes that the professional interests of the faculty and the interests of the institution are distinct, separable entities with which a faculty member could not simultaneously be aligned. The Court of Appeals found no justification for this distinction, and we perceive none. In fact, the faculty's professional interests—as applied to governance at a university like Yeshiva—cannot be separated from those of the institution.

In such a university, the predominant policy normally is to operate a quality institution of higher learning that will accomplish broadly defined educational goals within the limits of its financial resources. The "business" of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions. See K. Mortimer & T. McConnell, Sharing Authority Effectively 23–24 (1978). Faculty members enhance their own standing and fulfill their professional mission by ensuring that the university's objectives are met. But there can be no doubt that the quest for academic excellence and institutional distinction is a "policy" to which the administration expects the faculty to adhere, whether it be defined as a professional or an institutional goal. It is fruitless to ask whether an employee is "expected to conform" to one goal or another when the two are essentially the same.[27] See *NLRB* v. *Scott Paper Co.*,

[27] At Yeshiva, administrative concerns with scarce resources and University-wide balance have led to occasional vetoes of faculty action. But such infrequent administrative reversals in no way detract from the institution's primary concern with the academic responsibilities entrusted to the faculty. The suggestion that faculty interests depart from those of the institution with respect to salary and benefits is even less meritorious. The same is true of every supervisory or managerial employee. Indeed, there is arguably a greater community of interest on this point in the

440 F. 2d 625, 630 (CA1 1971) (tractor owner-operators); *Deaton Truck Line, Inc.* v. *NLRB*, 337 F. 2d 697, 699 (CA5 1964) (same), cert. denied, 381 U. S. 903 (1965).

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.[28] It may appear, as the Board contends, that the professor performing governance functions is less "accountable" for departures from institutional policy than a middle-level industrial manager whose discretion is more confined. Moreover, traditional systems of collegiality and tenure insulate the professor from some of the sanctions applied to an industrial manager who fails to adhere to company policy. But the analogy of the university to industry need not, and indeed cannot, be complete. It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies.[29] The large measure of independ-

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university than in industry, because the nature and quality of a university depend so heavily on the faculty attracted to the institution. B. Richman & R. Farmer, Leadership, Goals, and Power in Higher Education 258 (1974); see D. Bornheimer, G. Burns, & G. Dumke, The Faculty in Higher Education 174–175 (1973).

[28] See American Association for Higher Education, Faculty Participation in Academic Governance 22–24 (1967); Bornheimer, Burns, & Dumke, *supra*, at 149–150; Kadish, The Theory of the Profession and Its Predicament, 58 A. A. U. P. Bull. 120, 121 (1972). The extent to which Yeshiva faculty recommendations are implemented is no "mere coincidence," as MR. JUSTICE BRENNAN's dissent suggests. *Post*, at 701. Rather this is an inevitable characteristic of the governance structure adopted by universities like Yeshiva.

[29] The dissent concludes, citing several secondary authorities, that the modern university has undergone changes that have shifted "the task of operating the university enterprise" from faculty to administration. *Post*, at 703. The shift, if it exists, is neither universal nor complete. See

ence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

We certainly are not suggesting an application of the managerial exclusion that would sweep all professionals outside the Act in derogation of Congress' expressed intent to protect them. The Board has recognized that employees whose decisionmaking is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty.[30] Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management. We think these decisions accurately capture the intent of Congress, and that they provide an appropriate starting point for analysis in cases involving professionals alleged to be managerial.[31]

K. Mortimer & T. McConnell, Sharing Authority Effectively 27–28, 158–162, 164–165 (1978). In any event, our decision must be based on the record before us. Nor can we decide this case by weighing the probable benefits and burdens of faculty collective bargaining. See *post*, at 702–705. That, after all, is a matter for Congress, not this Court.

[30] For this reason, architects and engineers functioning as project captains for work performed by teams of professionals are deemed employees despite substantial planning responsibility and authority to direct and evaluate team members. See *General Dynamics Corp.*, 213 N. L. R. B., at 857–858; *Wurster, Bernardi & Emmons, Inc.*, 192 N. L. R. B. 1049, 1051 (1971); *Skidmore, Owings & Merrill*, 192 N. L. R. B. 920, 921 (1971). See also *Doctors' Hospital of Modesto, Inc.*, 183 N. L. R. B. 950, 951–952 (1970), enf'd, 489 F. 2d 772 (CA9 1973) (nurses); *National Broadcasting Co.*, 160 N. L. R. B. 1440, 1441 (1966) (broadcast newswriters). In the health-care context, the Board asks in each case whether the decisions alleged to be managerial or supervisory are "incidental to" or "in addition to" the treatment of patients, a test Congress expressly approved in 1974. S. Rep. No. 93–766, p. 6 (1974).

[31] We recognize that this is a starting point only, and that other factors not present here may enter into the analysis in other contexts. It is plain, for example, that professors may not be excluded merely because they

VI

Finally, the Board contends that the deference due its expertise in these matters requires us to reverse the decision of the Court of Appeals. The question we decide today is a mixed one of fact and law. But the Board's opinion may be searched in vain for relevant findings of fact. The absence of factual analysis apparently reflects the Board's view that the managerial status of particular faculties may be decided on the basis of conclusory rationales rather than examination of the facts of each case. The Court of Appeals took a different view, and determined that the faculty of Yeshiva University, "in effect, substantially and pervasively operat[e] the enterprise." 582 F. 2d, at 698. We find no reason to reject this conclusion. As our decisions consistently show, we accord great respect to the expertise of the Board when its conclusions are rationally based on articulated facts and consistent with the Act. *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978). In this case, we hold that the Board's decision satisfies neither criterion.

Affirmed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

In holding that the full-time faculty members of Yeshiva University are not covered employees under the National Labor Relations Act, but instead fall within the exclusion for

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determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly nonmanagerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates. But we express no opinion on these questions, for it is clear that the unit approved by the Board was far too broad.

supervisors and managerial employees, the Court disagrees with the determination of the National Labor Relations Board. Because I believe that the Board's decision was neither irrational nor inconsistent with the Act, I respectfully dissent.

I

Ten years ago the Board first asserted jurisdiction over private nonprofit institutions of higher education. *Cornell University*, 183 N. L. R. B. 329 (1970). Since then, the Board has often struggled with the Procrustean task of attempting to implement in the altogether different environment of the academic community the broad directives of a statutory scheme designed for the bureaucratic industrial workplace. See, *e. g.*, *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). Resolution of the particular issue presented in this case—whether full-time faculty members are covered "employees" under the Act—is but one of several challenges confronting the Board in this "unchartered area." *C. W. Post Center*, 189 N. L. R. B. 904, 905 (1971).

Because at the time of the Act's passage Congress did not contemplate its application to private universities, it is not surprising that the terms of the Act itself provide no answer to the question before us. Indeed, the statute evidences significant tension as to congressional intent in this respect by its explicit inclusion, on the one hand, of "professional employees" under § 2 (12), 29 U. S. C. § 152 (12), and its exclusion, on the other, of "supervisors" under § 2 (11), 29 U. S. C. § 152 (11). Similarly, when transplanted to the academic arena, the Act's extension of coverage to professionals under § 2 (12) cannot easily be squared with the Board-created exclusion of "managerial employees" in the industrial context. See generally *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267 (1974).

Primary authority to resolve these conflicts and to adapt the Act to the changing patterns of industrial relations was

entrusted to the Board, not to the judiciary. *NLRB* v. *Weingarten, Inc.*, 420 U. S. 251, 266 (1975). The Court has often admonished that "[t]he ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957). Accord, *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 235–236 (1963). Through its cumulative experience in dealing with labor-management relations in a variety of industrial and nonindustrial settings, it is the Board that has developed the expertise to determine whether coverage of a particular category of employees would further the objectives of the Act.[1] And through its continuous oversight of industrial conditions, it is the Board that is best able to formulate and adjust national labor policy to conform to the realities of industrial life. Accordingly, the judicial role is limited; a court may not substitute its own judgment for that of the Board. The Board's decision may be reviewed for its rationality and its consistency with the

[1] "It is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of 'where all the conditions of the relation require protection' involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self-organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question . . . 'belongs to the usual administrative routine' of the Board." *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 130 (1944). Accord, *NLRB* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 349 (1953).

Act, but once these criteria are satisfied, the order must be enforced. See *Beth Israel Hospital* v. *NLRB*, *supra*, at 501.

II

In any event, I believe the Board reached the correct result in determining that Yeshiva's full-time faculty is covered under the NLRA. The Court does not dispute that the faculty members are "professional employees" for the purposes of collective bargaining under § 2 (12), but nevertheless finds them excluded from coverage under the implied exclusion for "managerial employees."[2] The Court explains that "[t]he controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." *Ante*, at 686. But the academic community is simply not "any other context." The Court purports to recognize that there are fundamental differences between the authority structures of the typical industrial and academic institutions which preclude the blind transplanting of principles developed in one arena onto the other; yet it nevertheless ignores those very differences in concluding that Yeshiva's faculty is excluded from the Act's coverage.

As reflected in the legislative history of the Taft-Hartley Amendments of 1947, the concern behind the exclusion of supervisors under § 2 (11) of the Act is twofold. On the one hand, Congress sought to protect the rank-and-file employees from being unduly influenced in their selection of leaders by the presence of management representatives in their union. "If supervisors were members of and active in the union which represented the employees they supervised it could be pos-

[2] Because the Court concludes that Yeshiva's full-time faculty are managerial employees, it finds it unnecessary to reach the University's contention that the faculty are also excluded as "supervisors" under § 2 (11). *Ante*, at 682. My discussion therefore focuses on the question of the faculty's managerial status, but I would resolve the issue of their supervisory status in a similar fashion.

sible for the supervisors to obtain and retain positions of power in the union by reason of their authority over their fellow union members while working on the job." *NLRB* v. *Metropolitan Life Ins. Co.*, 405 F. 2d 1169, 1178 (CA2 1968). In addition, Congress wanted to ensure that employers would not be deprived of the undivided loyalty of their supervisory foremen. Congress was concerned that if supervisors were allowed to affiliate with labor organizations that represented the rank and file, they might become accountable to the workers, thus interfering with the supervisors' ability to discipline and control the employees in the interest of the employer.[3]

Identical considerations underlie the exclusion of managerial employees. See *ante*, at 682. Although a variety of verbal formulations have received judicial approval over the years, see *Retail Clerks International Assn.* v. *NLRB*, 125 U. S. App. D. C. 63, 65–66, 366 F. 2d 642, 644–645 (1966), this Court has recently sanctioned a definition of "managerial employee" that comprises those who " 'formulate and effectuate management policies by expressing and making operative the decisions of their employer.' " See *NLRB* v. *Bell Aerospace Co.*, 416 U. S., at 288. The touchstone of managerial status is thus an alliance with management, and the pivotal inquiry is whether the employee in performing his

[3] See H. R. Rep. No. 245, 80th Cong., 1st Sess., 14 (1947):

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with the purpose of the act . . . . It is inconsistent with the policy of Congress to assure to workers freedom from domination or control by their supervisors in their organizing and bargaining activities. It is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them."

See also S. Rep. No. 105, 80th Cong., 1st Sess., 3–5 (1947).

duties represents his own interests or those of his employer.[4] If his actions are undertaken for the purpose of implementing the employer's policies, then he is accountable to management and may be subject to conflicting loyalties. But if the employee is acting only on his own behalf and in his own interest, he is covered under the Act and is entitled to the benefits of collective bargaining.

After examining the voluminous record in this case,[5] the Board determined that the faculty at Yeshiva exercised its decisionmaking authority in its own interest rather than "in the interest of the employer." 221 N. L. R. B. 1053, 1054 (1975). The Court, in contrast, can perceive "no justification for this distinction" and concludes that the faculty's interests "cannot be separated from those of the institution." *Ante*, at 688.[6] But the Court's vision is clouded by its failure fully to discern and comprehend the nature of the faculty's role in university governance.

Unlike the purely hierarchical decisionmaking structure that prevails in the typical industrial organization, the bureaucratic foundation of most "mature" universities is characterized by dual authority systems. The primary decisional

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[4] Section 2 (11) of the Act requires, as a condition of supervisory status, that authority be exercised "in the interest of the employer." 29 U. S. C. § 152 (11). See also *NLRB* v. *Master Stevedores Assn.*, 418 F. 2d 140 (CA5 1969); *International Union of United Brewery Workers* v. *NLRB*, 111 U. S. App. D. C. 383, 298 F. 2d 297 (1961).

[5] The Board held hearings over a 5-month period and compiled a record containing more than 4,600 pages of testimony and 200 exhibits.

[6] The Court thus determines that all of Yeshiva's full-time faculty members are managerial employees, even though their role in university decisionmaking is limited to the professional recommendations of the faculty acting as a collective body, and even though they supervise and manage no personnel other than themselves. The anomaly of such a result demonstrates the error in extending the managerial exclusion to a class of essentially rank-and-file employees who do not represent the interests of management and who are not subject to the danger of conflicting loyalties which motivated the adoption of that exemption.

network is hierarchical in nature: Authority is lodged in the administration, and a formal chain of command runs from a lay governing board down through university officers to individual faculty members and students. At the same time, there exists a parallel professional network, in which formal mechanisms have been created to bring the expertise of the faculty into the decisionmaking process. See J. Baldridge, Power and Conflict in the University 114 (1971); Finkin, The NLRB in Higher Education, 5 U. Toledo L. Rev. 608, 614–618 (1974).

What the Board realized—and what the Court fails to apprehend—is that whatever influence the faculty wields in university decisionmaking is attributable solely to its collective expertise as professional educators, and not to any managerial or supervisory prerogatives. Although the administration may look to the faculty for advice on matters of professional and academic concern, the faculty offers its recommendations in order to serve its own independent interest in creating the most effective environment for learning, teaching, and scholarship.[7] And while the administration may attempt to defer to the faculty's competence whenever possible, it must and does apply its own distinct perspective to those recommendations, a perspective that is based on fiscal

[7] As the Board has recognized, due to the unique nature of their work, professional employees will often make recommendations on matters that are of great importance to management. But their desire to exert influence in these areas stems from the need to maintain their own professional standards, and this factor—common to all professionals—should not, by itself, preclude their inclusion in a bargaining unit. See *Westinghouse Electric Corp.*, 113 N. L. R. B. 337, 339–340 (1955). In fact, Congress clearly recognized both that professional employees consistently exercise independent judgment and discretion in the performance of their duties, see 29 U. S. C. § 152 (12), and that they have a significant interest in maintaining certain professional standards, see S. Rep. No. 105, 80th Cong., 1st Sess., 11 (1947). Yet Congress specifically included professionals within the Act's coverage. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 298 (1974) (WHITE, J., dissenting in part).

and other managerial policies which the faculty has no part in developing. The University always retains the ultimate decisionmaking authority, see *ante*, at 675–676, and the administration gives what weight and import to the faculty's collective judgment as it chooses and deems consistent with its own perception of the institution's needs and objectives.[8]

The premise of a finding of managerial status is a determination that the excluded employee is acting on behalf of management and is answerable to a higher authority in the exercise of his responsibilities. The Board has consistently implemented this requirement—both for professional and nonprofessional employees—by conferring managerial status only upon those employees "whose interests are closely aligned with management *as true representatives of management.*" (Emphasis added.) *E. g., Sutter Community Hospitals of Sacramento*, 227 N. L. R. B. 181, 193 (1976); *Bell Aero-*

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[8] One must be careful not to overvalue the significance of the faculty's influence on academic affairs. As one commentator has noted, "it is not extraordinary for employees to seek to exert influence over matters embedded in an employment relationship for which they share a concern, or that management would be responsive to their strongly held desires." Finkin, The NLRB in Higher Education, 5 U. Toledo L. Rev. 608, 616 (1974). Who, after all, is better suited than the faculty to decide what courses should be offered, how they should be taught, and by what standards their students should be graded? Employers will often attempt to defer to their employees' suggestions, particularly where—as here—those recommendations relate to matters within the unique competence of the employees.

Moreover, insofar as faculty members are given some say in more traditional managerial decisions such as the hiring and promotion of other personnel, such discretion does not constitute an adequate basis for the conferral of managerial or supervisory status. Indeed, in the typical industrial context, it is not uncommon for the employees' union to be given the *exclusive* right to recommend personnel to the employer, and these hiring-hall agreements have been upheld even where the union requires a worker to pass a union-administered skills test as a condition of referral. See, *e. g., Local 42 (Catalytic Constr. Co.)*, 164 N. L. R. B. 916 (1967); see generally *Teamsters* v. *NLRB*, 365 U. S. 667 (1961).

space, 219 N. L. R. B. 384, 385 (1975); *General Dynamics Corp.*, 213 N. L. R. B. 851, 857 (1974).[9] Only if the employee is expected to conform to management policies and is judged by his effectiveness in executing those policies does the danger of divided loyalties exist.

Yeshiva's faculty, however, is not accountable to the administration in its governance function, nor is any individual faculty member subject to personal sanction or control based on the administration's assessment of the worth of his recommendations. When the faculty, through the schools' advisory committees, participates in university decisionmaking on subjects of academic policy, it does not serve as the "representative of management."[10] Unlike industrial supervisors

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[9] The Board has also explained that the ability of the typical professional employee to influence company policy does not bestow managerial authority:

"Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because work performed in that status may have a bearing on company direction." *General Dynamics Corp.*, 213 N. L. R. B., at 857–858.

[10] Where faculty members actually do serve as management's representatives, the Board has not hesitated to exclude them from the Act's coverage as managerial or supervisory personnel. Compare *University of Vermont*, 223 N. L. R. B. 423 (1976) (excluding department chairmen as supervisors), and *University of Miami*, 213 N. L. R. B. 634 (1974) (excluding deans as supervisors), with *Northeastern University*, 218 N. L. R. B. 247 (1975) (department chairmen included within bargaining unit because they act primarily as instruments of the faculty), and *Fordham University*, 193 N. L. R. B. 134 (1971) (including department chairmen because they are considered to be representatives of the faculty rather than of the administration). In fact, the bargaining unit approved by the Board in the present case excluded deans, acting deans, directors, and principal investigators of research and training grants, all of whom were deemed to exercise supervisory or managerial authority. See *ante*, at 678, n. 7.

and managers, university professors are not hired to "make operative" the policies and decisions of their employer. Nor are they retained on the condition that their interests will correspond to those of the university administration. Indeed, the notion that a faculty member's professional competence could depend on his undivided loyalty to management is antithetical to the whole concept of academic freedom. Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy. Board Member Kennedy aptly concluded in his concurring opinion in *Northeastern University*, 218 N. L. R. B. 247, 257 (1975) (footnote omitted):

> "[T]he influence which the faculty exercises in many areas of academic governance is insufficient to make them 'managerial' employees. Such influence is not exercised 'for management' or 'in the interest of the employer,' but rather is exercised in their own professional interest. The best evidence of this fact is that faculty members are generally not held accountable by or to the administration for their faculty governance functions. Faculty criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations."

It is no answer to say, as does the Court, that Yeshiva's faculty and administration are one and the same because their interests tend to coincide. In the first place, the National Labor Relations Act does not condition its coverage on an antagonism of interests between the employer and the em-

ployee.[11] The mere coincidence of interests on many issues has never been thought to abrogate the right to collective bargaining on those topics as to which that coincidence is absent. Ultimately, the performance of an employee's duties will always further the interests of the employer, for in no institution do the interests of labor and management totally diverge. Both desire to maintain stable and profitable operations, and both are committed to creating the best possible product within existing financial constraints. Differences of opinion and emphasis may develop, however, on exactly how to devote the institution's resources to achieve those goals. When these disagreements surface, the national labor laws contemplate their resolution through the peaceful process of collective bargaining. And in this regard, Yeshiva University stands on the same footing as any other employer.

Moreover, the congruence of interests in this case ought not to be exaggerated. The university administration has certain economic and fiduciary responsibilities that are not shared by the faculty, whose primary concerns are academic and relate solely to its own professional reputation. The record evinces numerous instances in which the faculty's recommendations have been rejected by the administration on account of fiscal constraints or other managerial policies. Disputes have arisen between Yeshiva's faculty and administration on such fundamental issues as the hiring, tenure, promotion, retirement, and dismissal of faculty members,

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[11] Nor does the frequency with which an employer acquiesces in the recommendations of its employees convert them into managers or supervisors. See *Stop & Shop Cos., Inc.* v. *NLRB*, 548 F. 2d 17, 19 (CA1 1977). Rather, the pertinent inquiries are who retains the ultimate decisionmaking authority and in whose interest the suggestions are offered. A different test could permit an employer to deny its employees the benefits of collective bargaining on important issues of wages, hours, and other conditions of employment merely by consulting with them on a host of less significant matters and accepting their advice when it is consistent with management's own objectives.

academic standards and credits, departmental budgets, and even the faculty's choice of its own departmental representative.[12] The very fact that Yeshiva's faculty has voted for the Union to serve as its representative in future negotiations with the administration indicates that the faculty does not perceive its interests to be aligned with those of management. Indeed, on the precise topics which are specified as mandatory subjects of collective bargaining—wages, hours, and other terms and conditions of employment[13]—the interests of teacher and administrator are often diametrically opposed.

Finally, the Court's perception of the Yeshiva faculty's status is distorted by the rose-colored lens through which it views the governance structure of the modern-day university. The Court's conclusion that the faculty's professional interests are indistinguishable from those of the administration is bottomed on an idealized model of collegial decisionmaking that is a vestige of the great medieval university. But the university of today bears little resemblance to the "community of scholars" of yesteryear.[14] Education has become

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[12] See, *e. g.*, App. 740–742 (faculty hiring); *id.*, at 232–233, 632, 667 (tenure); *id.*, at 194, 620, 742–743 (promotion); *id.*, at 713, 1463–1464 (retirement); *id.*, at 241 (dismissal); *id.*, at 362 (academic credits); *id.*, at 723–724, 1469–1470 (cutback in departmental budget leading to loss of accreditation); *id.*, at 410, 726–727 (election of department chairman and representative).

[13] See 29 U. S. C. § 158 (d).

[14] See generally J. Brubacher & W. Rudy, Higher Education in Transition: A History of American Colleges and Universities, 1636–1976 (3d ed. 1976). In one of its earliest decisions in this area, the Board recognized that the governance structure of the typical modern university does not fit the mold of true collegiality in which authority rests with a peer group of scholars. *Adelphi University*, 195 N. L. R. B. 639, 648 (1972). Accord, *New York University*, 205 N. L. R. B. 4, 5 (1973). Even the concept of "shared authority," in which university decisionmaking is seen as the joint responsibility of both faculty and administration, with each exerting a dominant influence in its respective sphere of expertise, has

"big business," and the task of operating the university enterprise has been transferred from the faculty to an autonomous administration, which faces the same pressures to cut costs and increase efficiencies that confront any large industrial organization.[15] The past decade of budgetary cutbacks, declining enrollments, reductions in faculty appointments, curtailment of academic programs, and increasing calls for accountability to alumni and other special interest groups has only added to the erosion of the faculty's role in the institution's decisionmaking process.[16]

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been found to be "an ideal rather than a widely adopted practice." K. Mortimer & T. McConnell, Sharing Authority Effectively 4 (1978). The authors conclude:

"Higher education is in the throes of a shift from informal and consensual judgments to authority based on formal criteria. . . . There have been changes in societal and legislative expectations about higher education, an increase in external regulation of colleges and universities, an increase in emphasis on managerial skills and the technocratic features of modern management, and a greater codification of internal decision-making procedures. These changes raise the question whether existing statements of shared authority provide adequate guidelines for internal governance." *Id.*, at 269.

[15] In 1976–1977, the total expenditures of institutions of higher education in the United States exceeded $42 billion. National Center for Education Statistics, Digest of Education Statistics 137 (Table 133) (1979). In the same year, Yeshiva University, a private institution, received over $34 million in revenues from the Federal Government. *Id.*, at 132 (Table 127).

[16] University faculty members have been particularly hard hit by the current financial squeeze. Because of inflation, the purchasing power of the faculty's salary has declined an average of 2.9% every year since 1972. Real salaries are thus 13.6% below the 1972 levels. Hansen, An Era of Continuing Decline: Annual Report on the Economic Status of the Profession, 1978–1979, 65 Academe: Bulletin of the American Association of University Professors 319, 323–324 (1979). Moreover, the faculty at Yeshiva has fared even worse than most. Whereas the average salary of a full professor at a comparable institution is $31,100, a full professor at Yeshiva averages only $27,100. *Id.*, at 334, 348. In fact, a severe financial crisis at the University in 1971–1972 forced the president to order a freeze on all faculty promotions and pay increases. App. 1459.

These economic exigencies have also exacerbated the tensions in university labor relations, as the faculty and administration more and more frequently find themselves advocating conflicting positions not only on issues of compensation, job security, and working conditions, but even on subjects formerly thought to be the faculty's prerogative. In response to this friction, and in an attempt to avoid the strikes and work stoppages that have disrupted several major universities in recent years, many faculties have entered into collective-bargaining relationships with their administrations and governing boards.[17] An even greater number of schools—Yeshiva among them—have endeavored to negotiate and compromise their differences informally, by establishing avenues for faculty input into university decisions on matters of professional concern.

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[17] As of January 1979, 80 private and 302 public institutions of higher education had engaged in collective bargaining with their faculties, and over 130,000 academic personnel had been unionized. National Center for the Study of Collective Bargaining in Higher Education, Directory of Faculty Contracts and Bargaining Agents in Institutions of Higher Education i–ii (1979). Although the NLRA is not applicable to any public employer, see 29 U. S. C. § 152 (2), as of 1976, 22 States had enacted legislation granting faculties at public institutions the right to unionize and requiring public employers to bargain with duly constituted bargaining agents. Mortimer & McConnell, *supra* n. 14, at 53. See also Livingston & Christensen, State and Federal Regulation of Collective Negotiations in Higher Education, 1971 Wis. L. Rev. 91, 102.

The upsurge in the incidence of collective bargaining has generally been attributed to the faculty's desire to use the process as a countervailing force against increased administrative power and to ensure that the ideals of the academic community are actually practiced. As the Carnegie Commission found, "[u]nionization for [faculty] is more a protective than an aggressive act, more an effort to preserve the status quo than to achieve a new position of influence and affluence. . . ." Carnegie Commission on Higher Education, Governance of Higher Education 40 (1973). See also Mortimer & McConnell, *supra* n. 14, at 56; Lindeman, The Five Most Cited Reasons for Faculty Unionization, 102 Intellect 85 (1973); Nielsen & Polishook, Collective Bargaining and Beyond, The Chronicle of Higher Education 7 (May 21, 1979).

Today's decision, however, threatens to eliminate much of the administration's incentive to resolve its disputes with the faculty through open discussion and mutual agreement. By its overbroad and unwarranted interpretation of the managerial exclusion, the Court denies the faculty the protections of the NLRA and, in so doing, removes whatever deterrent value the Act's availability may offer against unreasonable administrative conduct.[18] Rather than promoting the Act's objective of funneling dissension between employers and employees into collective bargaining, the Court's decision undermines that goal and contributes to the possibility that "recurring disputes [will] fester outside the negotiation process until strikes or other forms of economic warfare occur." *Ford Motor Co.* v. *NLRB*, 441 U. S. 488, 499 (1979).

III

In sum, the Board analyzed both the essential purposes underlying the supervisory and managerial exclusions and the nature of the governance structure at Yeshiva University. Relying on three factors that attempt to encapsulate the fine distinction between those professional employees who are entitled to the NLRA's protections and those whose managerial responsibilities require their exclusion,[19] the Board concluded

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[18] The Carnegie Commission, in concluding that "faculty members should have the right to organize and to bargain collectively, if they so desire," Carnegie Commission on Higher Education, *supra*, at 43, observed:

"We may be involved in a long-term period of greater social conflict in society and greater tension on campus. If so, it may be better to institutionalize this conflict through collective bargaining than to have it manifest itself with less restraint. Collective bargaining does provide agreed-upon rules of behavior, contractual understandings, and mechanisms for dispute settlement and grievance handling that help to manage conflict." *Id.*, at 51.

[19] Contrary to the Court's assertion, see *ante*, at 685, the Board has not abandoned the "collective authority" and "ultimate authority" branches of its analysis. See Reply Brief for Petitioner in No. 78-857, pp. 11–12, n. 8. Although the "interest/alignment analysis" rationale goes to the

that Yeshiva's full-time faculty qualify as the former rather than the latter. I believe the Board made the correct determination. But even were I to have reservations about the specific result reached by the Board on the facts of this case, I would certainly have to conclude that the Board applied a proper mode of analysis to arrive at a decision well within the zone of reasonableness. Accordingly, in light of the deference due the Board's determination in this complex area, I would reverse the judgment of the Court of Appeals.

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heart of the basis for the managerial and supervisory exclusions and therefore provides the strongest support for the Board's determination, the other two rationales are significant because they highlight two aspects of the university decisionmaking process relevant to the Board's decision: That the faculty's influence is exercised collectively—and only collectively—indicates that the faculty's recommendations embody the views of the rank and file rather than those of a select group of persons charged with formulating and implementing management policies. Similarly, that the administration retains ultimate authority merely indicates that a true system of collegiality is simply not the mode of governance at Yeshiva University.

UNITED STATES ET AL. v. EUGE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 78–1453. Argued November 26, 1979—Decided February 20, 1980

Section 7602 of the Internal Revenue Code of 1954 authorizes the Internal Revenue Service to summon individuals to "appear," and "to produce such books, papers, records, or other data, and to give such testimony," as may be relevant to a tax investigation. During an investigation of respondent's income tax liability, in an effort to determine whether deposits in certain bank accounts not registered in respondent's name represented income attributable to him, an IRS agent issued a summons requiring respondent to appear and execute handwriting exemplars of the various signatures appearing on the bank signature cards. When respondent refused to comply with the summons, the United States brought suit to enforce it. The District Court held that the summons should be enforced, but the Court of Appeals reversed, holding that the summons authority under § 7602 does not authorize the IRS to compel the execution of handwriting exemplars.

Held: The IRS is empowered to compel handwriting exemplars under its summons authority conferred by § 7602. Pp. 710–719.

(a) While § 7602's language may not be explicit in authorizing handwriting exemplars, the duty to appear and give testimony has traditionally encompassed a duty to provide some forms of nontestimonial, physical evidence, including handwriting exemplars. By imposing an obligation to produce documents as well as to appear and give testimony, § 7602's language suggests an intention to codify a broad testimonial obligation, including an obligation to provide some physical evidence relevant and material to a tax investigation. From this authority to compel the production of some physical evidence, it can properly be concluded that the authority extends to the execution of handwriting exemplars, one variety of physical evidence. Pp. 712–714.

(b) This Court has consistently construed congressional intent to require that if the claimed summons authority is necessary for the effective performance of congressionally imposed responsibilities to enforce the Internal Revenue Code, that authority should be upheld absent express statutory prohibition or substantial countervailing congressional policies. Pp. 714–716.

(c) The authority claimed here is necessary for the effective exercise of the IRS's enforcement responsibilities. Handwriting exemplars are often an important evidentiary component in establishing tax liability, the use of such exemplars being an effective method for determining whether a particular name is an alias of a taxpayer. Pp. 716–717.

(d) Moreover, the authority claimed here is entirely consistent with the statutory language and is not in derogation of any countervailing policies or any constitutional rights, compulsion of handwriting exemplars being neither a search or seizure subject to Fourth Amendment protections nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. Pp. 717–718.

587 F. 2d 25, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL and STEVENS, JJ., joined, *post*, p. 719. MARSHALL, J., filed a dissenting opinion, *post*, p. 720.

Stuart A. Smith argued the cause for the United States et al. With him on the brief were *Acting Solicitor General Wallace, Assistant Attorney General Ferguson, Robert E. Lindsay,* and *Carleton D. Powell.*

James W. Erwin, by appointment of the Court, 442 U. S. 915, argued the cause for respondent. With him on the brief were *William L. Hungate* and *Charles A. Newman.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

The United States sued in the District Court seeking enforcement of an Internal Revenue Service summons requiring respondent to appear and provide handwriting exemplars. Enforcement was denied by the Court of Appeals for the Eighth Circuit, 587 F. 2d 25 (1978) (en banc), and we granted certiorari.[1] 441 U. S. 942. We now hold that Con-

[1] The Fourth Circuit reached a contrary result in *United States* v. *Rosinsky,* 547 F. 2d 249 (1977). The Sixth Circuit decided this issue in accord with the Eighth Circuit. *United States* v. *Brown,* 536 F. 2d 117 (1976).

gress has empowered the IRS to compel handwriting exemplars under its summons authority conferred by 26 U. S. C. § 7602.

I

The facts are not in dispute. In October 1977, an agent in the Intelligence Division of the Internal Revenue Service was assigned to investigate respondent's income tax liability for the years 1973 through 1976. Respondent had not filed any tax returns for those years. The Service sought to employ the "bank deposits method" of reconstructing respondent's income for those years, as a means of calculating his tax liability. Under this method of proof, the sums deposited in the taxpayer's bank accounts are scrutinized to determine whether they represent taxable income.

During the course of the investigation, the agent found only two bank accounts registered in respondent's name. Twenty other bank accounts were discovered, however, which the agent had reason to believe were being maintained by respondent under aliases to conceal taxable income. The statements for these accounts were sent to post office boxes held in respondent's name; the signature cards for the accounts listed addresses of properties owned by respondent; and the agent had documented frequent transfers of funds between the accounts.

In an effort to determine whether the sums deposited in these accounts represented income attributable to respondent, the agent issued a summons on October 7, 1977, requiring respondent to appear and execute handwriting exemplars of the various signatures appearing on the bank signature cards. Respondent declined to comply with the summons.

The United States commenced this action under 26 U. S. C. § 7604 (a). The District Court held that the summons should be enforced, ordering respondent to provide 10 handwriting exemplars of 8 different signatures. The Court of Appeals reversed, ruling that the summons authority vested in the Internal Revenue Service under 26 U. S. C. § 7602 does not

authorize the IRS to compel the execution of handwriting exemplars.[2]

II

The structure and history of the statutory authority of the Internal Revenue Service to summon witnesses to produce evidence necessary for tax investigations has been repeatedly reviewed by this Court in recent years. See *Reisman* v. *Caplin*, 375 U. S. 440 (1964); *United States* v. *Powell*, 379 U. S. 48 (1964); *Donaldson* v. *United States*, 400 U. S. 517 (1971); *United States* v. *Bisceglia*, 420 U. S. 141 (1975); *Fisher* v. *United States*, 425 U. S. 391 (1976); *United States* v. *LaSalle National Bank*, 437 U. S. 298 (1978). Under § 7602, the Secretary of the Treasury, and therefore the IRS as his designate,[3] is authorized to summon individuals to "appear before the Secretary . . . and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ." [4] The ques-

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[2] The precise reasons for the court's holding are not clear. In the opinion, the court suggests that the statute does not authorize the IRS to compel a taxpayer to create evidence "out of thin air." 587 F. 2d 25, 27, n. 3 (1978). The opinion also states, however, that it adopts the views expressed in the dissenting opinion in *United States* v. *Campbell*, 524 F. 2d 604, 608 (CA8 1975). The principal reason forwarded in that decision for declining to construe § 7602 to authorize production of handwriting exemplars was the conclusion that such an order would constitute a seizure in violation of the Fourth Amendment. As discussed *infra*, neither rationale supports the conclusion reached by the Court of Appeals.

[3] Responsibility for administration and enforcement of the revenue laws is vested in the Secretary of the Treasury. 26 U. S. C. § 7801 (a). The Internal Revenue Service, however, is organized to carry out those responsibilities for the Secretary. See *Donaldson* v. *United States*, 400 U. S., at 534; 35 Fed. Reg. 2417 *et seq.* (1970). For the purposes of this opinion, we refer to the authority and responsibilities of the Secretary and the Service interchangeably.

[4] "SEC. 7602. Examination of Books and Witnesses.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person

tion presented here is whether this power to compel a witness to "appear," to produce "other data," and to "give testimony," includes the power to compel the execution of handwriting exemplars. We conclude that it does, for several reasons. While the language may not be explicit in its authorization of handwriting exemplars, the duty to appear and give testimony, a duty imposed by § 7602, has traditionally encompassed a duty to provide some forms of nontestimonial, physical evidence, including handwriting exemplars. Further, this Court has consistently construed congressional intent to require that if the summons authority claimed is necessary for the effective performance of congressionally imposed responsibilities to enforce the tax Code, that authority should be upheld absent express statutory prohibition or substantial countervailing policies. The authority claimed here is necessary for the effective exercise of the Service's enforcement responsibilities; it is entirely consistent with the statutory language; and it is not in derogation of any constitutional rights or countervailing policies enunciated by Congress.

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for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

A

Through § 7602, Congress has imposed a duty on persons possessing information "relevant or material" to an investigation of federal tax liability to produce that information at the request of the Secretary or his delegate. That duty to provide relevant information expressly obligates the person summoned to produce documentary evidence and to "appear" and "give testimony." Imposition of such an evidentiary obligation is, of course, not a novel innovation attributable to § 7602. The common law has been the source of a comparable evidentiary obligation for centuries. In determining the scope of the obligation Congress intended to impose by use of this language, we have previously analogized, as an interpretive guide, to the common-law duties attaching to the issuance of a testimonial summons. See *United States* v. *Bisceglia, supra,* at 147–148; *United States* v. *Powell, supra,* at 57. Congress, through legislation, may expand or contract the duty imposed,[5] but absent some contrary expression, there is a wealth of history helpful in defining the duties imposed by the issuance of a summons.

The scope of the "testimonial" [6] or evidentiary duty imposed by common law or statute has traditionally been interpreted as an expansive duty limited principally by relevance and privilege. As this Court described the contours of the duty in *United States* v. *Bryan,* 339 U. S. 323, 331 (1950): "[P]ersons summoned as witnesses by competent authority have certain minimum duties and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery.... We have often iterated the importance of this public duty, which every person within

[5] Legislative efforts to *expand* the scope of the testimonial obligation would, of course, be limited by the applicable constitutional guarantees.

[6] The word "testimony" has been used loosely in this context to refer to physical and documentary, as well as oral, evidence. See 8 J. Wigmore, Evidence § 2194, p. 76 (McNaughton Rev. 1961).

the jurisdiction of the Government is bound to perform when properly summoned." While the Court recognized that certain exemptions would be upheld, the "primary assumption" was that a summoned party must "give what testimony one is capable of giving" absent an exemption "grounded in a substantial individual interest which has been found, through centuries of experience, to outweigh the public interest in the search for truth." *Ibid.*

One application of this broad duty to provide relevant evidence has been the recognition, since early times, of an obligation to provide certain forms of nontestimonial physical evidence.[7] In *Holt* v. *United States*, 218 U. S. 245, 252–253 (1910) (Holmes, J.), the Court found that the common-law evidentiary duty permitted the compulsion of various forms of physical evidence. In *Schmerber* v. *California*, 384 U. S. 757, 764 (1966), this Court observed that traditionally witnesses could be compelled, in both state and federal courts, to submit to "fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture." See also *United States* v. *Wade*, 388 U. S. 218 (1967). In *Gilbert* v. *California*, 388 U. S. 263, 266–267 (1967), handwriting was held, "like the . . . body itself" to be an "identifying physical characteristic," subject to production. In *United States* v. *Dionisio*, 410 U. S. 1 (1973), and *United States* v. *Mara*, 410 U. S. 19 (1973), this Court again confirmed that handwriting is in the nature of physical evidence which can be compelled by a grand jury in the exercise of its subpoena power. See also *United States* v. *Mullaney*, 32 F. 370 (CC Mo. 1887).

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[7] Wigmore has identified the testimonial duty as including an obligation "to disclose for the purpose of justice all that is in his control which can serve the ascertainment of the truth, [and] this duty includes not only mental impressions preserved in his brain and the documents preserved in his hands, but also the corporal facts existing on his *body*." *Ibid.*

This broad duty to provide most relevant, nonprivileged evidence has not been considered to exist only in the common law. The Court has recognized that by statute "Congress may provide for the performance of this duty." *Blackmer* v. *United States*, 284 U. S. 421, 438 (1932). By imposing an obligation to produce documents as well as to appear and give testimony, we believe the language of § 7602 suggests an intention to codify a broad testimonial obligation, including an obligation to provide some physical evidence relevant and material to a tax investigation, subject to the traditional privileges and limitations. This conclusion seems inherent in the imposition of an obligation to "appear," since an obligation to appear necessarily entails an obligation to display physical features to the summoning authority. Congress thereby authorized the Service to compel the production of some physical evidence, and it is certainly possible to conclude that this authorization extended to the execution of handwriting exemplars, one variety of relevant physical evidence. This construction of the language conforms with the historical notions of the testimonial duty attaching to the issuance of a summons.[8]

B

Congress certainly could have narrowed the common-law testimonial duty in enacting § 7602, and thus we do not rely solely on the common-law meaning of the statutory language. Section 7602 does not, by its terms, compel the production of handwriting exemplars, and therefore, a narrower interpretation of the duty imposed is not precluded by the actual language of the statute. A narrower interpretation *is* precluded, however, by the precedents of this Court construing that statute. As early as 1911, this Court established the benchmarks for interpreting the authority of the Internal Revenue Service

[8] As indicated elsewhere, we do not suggest that the evidentiary obligation codified in § 7602 in all respects conforms to the common law. We rely on the analogy only as one interpretive *guide*. *Supra*, at 712.

to enforce tax obligations in holding that "the administration of the statute may well be taken to embrace all appropriate measures for its enforcement, [unless] there is . . . substantial reason for assigning to the phrase[s] . . . a narrower interpretation." *United States* v. *Chamberlin*, 219 U. S. 250, 269. This precise mode of construction has consistently been applied by this Court in construing the breadth of the summons authority Congress intended to confer in § 7602. In *United States* v. *Powell*, 379 U. S. 48 (1964), the Court declined to construe § 7605 (b), prohibiting the Secretary from conducting "unnecessary examination[s]," to require probable cause for the issuance of a § 7602 summons. The Court found that "[a]lthough a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted. . . ." 379 U. S., at 53–54. In *Donaldson* v. *United States*, 400 U. S. 517 (1971), the Court refused to hold that the summons authority could not be used whenever there was a potential that the civil investigation might later lead to criminal prosecution. In construing the scope of the summons authority, the Court emphasized that it refused to draw the line in a manner that would "stultify enforcement of federal law." *Id.*, at 536. Finally, in *United States* v. *Bisceglia*, 420 U. S. 141 (1975), the Court upheld the Service's authority to issue a John Doe summons to a bank in order to discover the identity of an individual unknown to the Service. The Court reasoned that absent that construction, "no meaningful investigation of such events could be conducted" and thus "[s]ettled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress." *Id.*, at 150. There is thus a formidable line of precedent construing congressional intent to uphold the claimed enforcement authority of the Service if authority is necessary for the effective enforcement of the

revenue laws and is not undercut by contrary legislative purposes.[9]

Applying these principles, we conclude that Congress empowered the Service to seek, and obliged the witness to provide, handwriting exemplars relevant to the investigation. First, there is no question that handwriting exemplars will often be an important evidentiary component in establishing tax liability. The statutory framework, as reviewed in the numerous precedents recited *supra*, imposes on the Secretary of the Treasury, and the IRS as his designate, a broad duty to enforce the tax laws. 26 U. S. C. § 7601 (a). Congress has legislated that the Secretary is "required to make the inquiries, determinations, and assessments of all taxes . . . imposed by this title. . . ." 26 U. S. C. § 6201 (a). Under § 6301 the Secretary "shall collect the taxes imposed by the internal revenue laws." In order to fulfill these duties, the Service will often need to determine whether a particular name is an alias of a taxpayer. One effective method for resolving that issue is through the use of handwriting exemplars.[10] As we recognized in *Bisceglia*, the IRS does have a need for investigative devices which assist them in ascertaining the identity of tax

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[9] Congressional intent to provide the Secretary with broad latitude to adopt enforcement techniques helpful in the performance of his tax collection and assessment responsibilities is expressed throughout the Code. In § 6302, for example, Congress has conferred the Secretary with discretion to devise methods of tax collection not specifically provided by statute:

"Whether or not the method of collecting any tax imposed . . . is specifically provided for by this title, any such tax may . . . be collected by . . . other reasonable devices or methods as may be necessary or helpful in securing a complete and proper collection of the tax."

[10] The United States suggests there are numerous uses of handwriting exemplars helpful to the Service. Not only are they useful in identifying the holder of a bank account, but they are also said to be useful for identifying persons who file multiple tax returns under false names claiming income tax refunds, purchase of money orders under false names, and forgery of joint returns to take advantage of lower joint rates.

evaders. In *Bisceglia*, we held, in language relevant to this case:

> "[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases. Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress." 420 U. S., at 150.

There is certainly nothing in the statutory language,[11] or in the legislative history,[12] precluding the interpretation

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[11] Respondent argues that the language of § 7602 suggests that it only requires the production of documents already in existence. Since handwriting exemplars must be created by the witness, it is argued that the statute is inapplicable. First, we do not view the exhibition of physical characteristics to be equivalent to the creation of documentary evidence. See *United States* v. *Dionisio*, 410 U. S. 1, 6 (1973). Further, the statute obviously contemplates the transformation of some evidence not formerly tangible, since it obligates the summoned individual to provide testimony. The testimony, of course, creates evidence not previously in existence. We see no difference between the nature of the evidence created when the witness is ordered to talk and that created when he is ordered to write.

We express no opinion on the scope of the Service's authority to otherwise order the witness to generate previously nonexistent documentation under § 7602. The Service in fact has expressly disclaimed any intention to order the creation of documents. The Internal Revenue Manual § 4022.64 (4) (CCH 1977) provides that an administrative summons

"should not require the witness to do anything other than to appear on a given date to give testimony and to bring with him/her existing books, papers and records. A witness cannot be required to prepare or create documents."

The section states, however, that "[t]he giving of exemplars, for example, handwriting exemplars, at an appearance pursuant to a summons is not 'creating a document.'"

[12] The legislative history is simply unilluminating. The only conclusion which that history supports is that Congress did not intend to change the

asserted by the Service. Nor is there any constitutional privilege of the taxpayer or other parties that is violated by this construction. Compulsion of handwriting exemplars is neither a search or seizure subject to Fourth Amendment protections, *United States* v. *Mara*, 410 U. S. 19 (1973), nor testimonial evidence protected by the Fifth Amendment privilege against self-incrimination. *Gilbert* v. *California*, 388 U. S. 263 (1967). The compulsion of handwriting exemplars has been the subject of far less protection than the compulsion of testimony and documents.[13] Since Congress has explicitly established an obligation to provide the more protected forms of evidence, it would seem curious had it chosen not to impose an obligation to produce a form of evidence tradition has found it less important to protect.[14]

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expanse of the § 7602 summons authority by its amendments in 1954. H. R. Rep. No. 1337, 83d Cong., 2d Sess. (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. (1954). Since there are no pre-1954 interpretations of the statute precluding the issuance of handwriting exemplars, the legislative history sheds no light on the construction intended by Congress.

[13] *Gilbert* v. *California*, 388 U. S. 263 (1967), demonstrates the minimal level of protection afforded handwriting exemplars, and the reasons why such protection is unnecessary. The Court found that production of the exemplars was not subject to the Fifth Amendment privilege, and that their creation did not represent a critical stage requiring counsel. The Court found only a "minimal risk that the absence of counsel might derogate from [a] right to a fair trial." *Id.*, at 267. The Court concluded that "[i]f, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts." *Ibid.*

[14] *Palmer* v. *United States*, 530 F. 2d 787 (CA8 1976), similarly construed 28 U. S. C. § 1826 (a). That statute authorizes the imposition of contempt on witnesses who refuse to "testify or provide other information." The statute does not explicitly authorize contempt sanctions for refusal to execute handwriting exemplars. The court found that the legislative history indicated that Congress had intended, through the use of the language employed in the statute, to "codify present civil contempt practice." Since that practice had included the power to punish a witness for refusing

As we have emphasized in other cases dealing with § 7602 proceedings, the summoned party is entitled to challenge the issuance of the summons in an adversary proceeding in federal court prior to enforcement, and may assert appropriate defenses. See *Bisceglia*, 420 U. S., at 151. The Service must also establish compliance with the good-faith requirements recognized by this Court, *United States* v. *LaSalle National Bank*, 437 U. S., at 318, and with the requirement of § 7605 (b) that "[n]o taxpayer shall be subjected to unnecessary examination or investigation. . . ." These protections are quite sufficient to lead us to refuse to strain to imply additional ones from the neutral language Congress has used in § 7602.

We accordingly reverse the judgment of the Court of Appeals refusing enforcement of the summons.

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Internal Revenue Service, unlike common-law courts, has only such authority as Congress gives it. Cf. *United States* v. *LaSalle National Bank*, 437 U. S. 298, 307 (1978) (validity of Service summonses depends on "whether they were among those authorized by Congress"). Congress has granted the Service authority to summon individuals "to appear before the Secretary . . . at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry. . . ." 26 U. S. C. § 7602. The Court holds today that this authority to compel "testimony" includes authority to compel the creation of handwriting exemplars.[1]

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to create a handwriting exemplar, the court reasoned that Congress must have thought this phrasing adequate to cover production of handwriting samples.

[1] The Court also places some reliance on the word "appear," which the Court suggests "necessarily entails an obligation to display physical fea-

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The Court, however, is unable to point to anything in the statutory language or legislative history that even suggests that the obligation to "give testimony" includes an obligation to *create* a handwriting exemplar. Indeed, the Court concedes, as it must, that a handwriting exemplar is a kind of *nontestimonial* physical evidence.[2] Certainly, Congress has the power to authorize the Service to compel the creation of exemplars, but it has not chosen to do so in § 7602.[3] Accordingly, I dissent.

MR. JUSTICE MARSHALL, dissenting.

In my view, the Fifth Amendment's privilege against compulsory self-incrimination prohibits the Government from requiring a person to provide handwriting exemplars. As I stated in my dissenting opinion in *United States* v. *Mara*, 410 U. S. 19, 33 (1973), "I cannot accept the notion that the Government can compel a man to cooperate affirmatively in securing incriminating evidence when that evidence could not be obtained without the cooperation of the suspect." The Fifth Amendment privilege is rooted in "the basic stream of religious and political principle[,] . . . reflects the limits of the individual's attornment to the state," *In re Gault*, 387

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tures to the summoning authority." *Ante*, at 714. Plainly "appear" adds nothing to the authority of the Service. The word is used only to indicate that the person summoned must deliver the requested testimony or documents at the designated time and place.

[2] The Court's use of the label "nontestimonial" is meaningful, for "[t]estimony properly means only such evidence as is delivered by a witness . . . , either orally or in the form of affidavits or depositions." Black's Law Dictionary 1324 (5th ed. 1979). Testimony is a statement of knowledge or belief by a witness as opposed to the mere display of a physical characteristic.

[3] Even if I thought the statute were ambiguous, I would reach the same result because I strongly believe that "until Congress has stated otherwise, our duty to protect the rights of the individual should hold sway over the interest in more effective law enforcement." *Dalia* v. *United States*, 441 U. S. 238, 263 (1979) (STEVENS, J., dissenting).

U. S. 1, 47 (1967), and embodies the "respect a government—state or federal—must accord to the dignity and integrity of its citizens," *Miranda* v. *Arizona*, 384 U. S. 436, 460 (1966). I continue to believe, then, that "[i]t is only by prohibiting the Government from compelling an individual to cooperate affirmatively in securing incriminating evidence which could not be obtained without his active assistance, that 'the inviolability of the human personality' is assured." *United States* v. *Mara*, *supra*, at 34–35 (dissenting opinion) (quoting *Miranda* v. *Arizona*, *supra*, at 460).

In order to avoid this constitutional problem, I agree with my Brother BRENNAN, see *ante*, p. 719, that 26 U. S. C. § 7602 should be construed not to permit Internal Revenue Service personnel to compel the production of handwriting exemplars. Accordingly, I dissent.

Reporter's Note

The next page is purposely numbered 801. The numbers between 721 and 801 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FROM OCTOBER 1, 1979, THROUGH FEBRUARY 22, 1980

OCTOBER 1, 1979

Affirmed on Appeal

No. 78–1882. WOLMAN ET AL. *v.* WALTER ET AL. Affirmed on appeal from D. C. S. D. Ohio. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART dissent.

Appeals Dismissed

No. 78–1671. DODSON INSURANCE GROUP *v.* MALONEY, JUDGE. Appeal from Sup. Ct. N. M. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1833. MONROE *v.* MONROE. Appeal from Sup. Ct. Conn. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 177 Conn. 173, 413 A. 2d 819.

No. 78–6645. CARTER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6743. WELCH *v.* FALKE, PROSECUTING ATTORNEY OF MONTGOMERY COUNTY, ET AL. Appeal from Sup. Ct. Ohio dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6765. LINDEN *v.* HARPER & ROW PUBLISHERS, INC. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6768. RAITPORT *v.* LYONS, PRISON SUPERINTENDENT. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6771. WAYLAND *v.* HARKAWAY. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6875. LINDEN *v.* SHORE ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6876. WAYLAND *v.* MOORE ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 601 F. 2d 571.

No. 78–6896. BERENHOLZ *v.* BERENHOLZ. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–6904. KALENIAN *v.* KALENIAN. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–5072. GARCIA *v.* ARIZONA. Appeal from Ct. App. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1710. FORD *v.* TEXAS. Appeal from County Ct. at Law, Comal County, Tex., dismissed for want of substantial federal question.

No. 79–5100. PETRILLO *v.* SPATOLA. Appeal from Super. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 78–1808. CONWAY ET AL. *v.* HOSPITAL CORPORATION OF AMERICA ET AL. Appeal from Ct. Civ. App. Tex., 6th Sup. Jud. Dist., dismissed for want of substantial federal question. Reported below: 577 S. W. 2d 534.

No. 78–1812. O'DONNELL ET AL. *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 404 Mich. 524, 273 N. W. 2d 829.

No. 78–1828. SPARKS ET AL. *v.* PARKER, JUDGE. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 368 So. 2d 528.

No. 78–1854. WARREN ET AL. *v.* SUN OIL CO. Appeal from Ct. App. Okla. dismissed for want of substantial federal question.

No. 78–1936. RINEHART *v.* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 65 App. Div. 2d 63, 410 N. Y. S. 2d 850.

No. 78–6704. FINCE *v.* KLEIN, COMMISSIONER, DEPARTMENT OF HUMAN SERVICES, ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question.

No. 78–6911. LAMAR *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 243 Ga. 401, 254 S. E. 2d 353.

No. 79–34. STINSON *v.* LOUISIANA STATE BAR ASSN. Appeal from Sup. Ct. La. dismissed for want of substantial federal question. Reported below: 368 So. 2d 971.

No. 79–13. FOSTER *v.* COUNTY SCHOOL BOARD OF PRINCE WILLIAM COUNTY. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question. Reported below: 219 Va. LXXVII.

No. 79–38. PERRY, ADMINISTRATRIX *v.* KALAMAZOO STATE HOSPITAL. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 404 Mich. 205, 273 N. W. 2d 421.

No. 79–49. PREST *v.* HERBST, COMMISSIONER, DEPARTMENT OF NATURAL RESOURCES OF MINNESOTA, ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 278 N. W. 2d 732.

No. 79–90. SKELTON *v.* CITY OF BIRMINGHAM. Appeal from Ct. Crim. App. Ala. dismissed for want of substantial federal question. Reported below: 368 So. 2d 877.

No. 79–126. DUDLEY ET UX. *v.* NEBRASKA STATE BANK. Appeal from Sup. Ct. Neb. dismissed for want of substantial federal question. Reported below: 203 Neb. 226, 278 N. W. 2d 334.

No. 79–146. SLAGLE ET AL. *v.* PARKER ET AL. Appeal from Sup. Ct. Ala. dismissed for want of substantial federal question. Reported below: 370 So. 2d 947.

No. 79–164. SPIEGEL, INC. *v.* SOUTH DAKOTA EX REL. MEIERHENRY, ATTORNEY GENERAL OF SOUTH DAKOTA, ET AL. Appeal from Sup. Ct. S. D. dismissed for want of substantial federal question. Reported below: 277 N. W. 2d 298.

No. 79–5098. WILSON *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 58 Ohio St. 2d 52, 388 N. E. 2d 745.

No. 79–5099. HINKLE *v.* OHIO. Appeal from Ct. App. Ohio, Cuyahoga County, dismissed for want of substantial federal question.

No. 79–5165. POSTELL *v.* TEXAS. Appeal from County Ct. at Law No. 4, El Paso County, Tex., dismissed for want of substantial federal question.

No. 78–1937. METRO BROADCASTING CO., INC. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO. Appeal from Sup. Ct. P. R. dismissed for want of jurisdiction. Reported below: — P. R. R. —.

No. 78–1940. O'CONNOR ET AL. *v.* SAN FRANCISCO POLICE COMMISSION ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 90 Cal. App. 3d 107, 153 Cal. Rptr. 306.

No. 78–6413. LETOURNEAU *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. Appeal from D. C. S. D. N. Y. dismissed as untimely. MR. JUSTICE BLACKMUN would affirm the judgment. Reported below: 453 F. Supp. 636.

No. 79–130. BEHNKE *v.* COMMITTEE OF PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSN. Appeal from Sup. Ct. Iowa dismissed for want of substantial federal question. MR. JUSTICE BRENNAN would note probable jurisdiction and set case for oral argument. Reported below: 276 N. W. 2d 838.

No. 78–6750. CONRAD *v.* REGAN, U. S. DISTRICT JUDGE, ET AL. Appeal from D. C. D. C. dismissed for want of jurisdiction.

Vacated and Remanded on Appeal

No. 78–1780. CROWELL, SECRETARY OF STATE OF TENNESSEE, ET AL. *v.* MADER ET AL. Appeal from D. C. M. D. Tenn. Judgment vacated and case remanded with directions to dismiss cause as moot.*

Certiorari Granted—Vacated and Remanded

No. 78–6659. BLAKE *v.* THOMPSON, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Reported below: 595 F. 2d 1222.

No. 78–6840. CORLEY *v.* UNITED STATES. Ct. App. D. C. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of position presently asserted by the Solicitor General in his memorandum filed August 31, 1979. MR. JUSTICE REHNQUIST and MR. JUSTICE STEVENS dissent.

No. 79–110. KENTUCKY *v.* MARTIN. Ct. App. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979). Reported below: 581 S. W. 2d 368.

Miscellaneous Orders

No. A–1060 (O. T. 1978). NASH ET AL. *v.* CHANDLER ET AL. C. A. 5th Cir. Application for stay or to vacate injunction, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–12. CHAFFIN *v.* THOMAS, SHERIFF. C. A. 5th Cir. Application for stay and bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

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*[REPORTER'S NOTE: Subsequently, this order was vacated on rehearing. *Ante*, p. 505.]

No. A–1134 (O. T. 1978). PENNHURST STATE SCHOOL AND HOSPITAL ET AL. *v.* HALDERMAN ET AL. Application for stay of judgment and order of the United States District Court for the Eastern District of Pennsylvania, dated March 5, 1979, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

No. A–59 (79–206). MANLEY INVESTMENT CO. *v.* THOMAS W. GARLAND, INC., ET AL. Application for stay of proceedings in the United States District Court for the Eastern District of Missouri, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–71. CARLOS ET AL. *v.* UNITED STATES ET AL. D. C. E. D. N. Y. Application for injunction, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. A–95. RETAIL STORE EMPLOYEES UNION, LOCAL NO. 919, ET AL. *v.* UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION ET AL. Application for stay pending appeal to the United States Court of Appeals for the Second Circuit, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–101 (79–231). PACIFIC TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and

No. A–102 (79–232). GENERAL TELEPHONE COMPANY OF CALIFORNIA *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Applications for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–133. EVANS, AKA YONAN, ET AL. *v.* SECRETARY OF THE ARMY ET AL. C. A. 7th Cir. Application for an injunction, addressed to MR. JUSTICE WHITE and referred to the Court, denied.

No. A–172. LENHARD ET AL., CLARK COUNTY DEPUTY PUBLIC DEFENDERS, INDIVIDUALLY AND AS NEXT FRIENDS OF BISHOP *v.* WOLFF, WARDEN, ET AL. C. A. 9th Cir. Applica-

tion for stay of execution of sentence of death, presented to MR. JUSTICE REHNQUIST, and by him stayed to and including October 1, 1979, and referred to the Court, denied.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

I continue to adhere to my view that the death penalty is unconstitutional in all circumstances. Accordingly, I dissent. In addition, however, I feel compelled to note that the present decision is indefensible even under the more restrictive view of the Eighth Amendment taken by a majority of my Brethren. For today the Court grants a man's wish to be put to death even though the sentencing hearing accorded to him failed to comply with the procedural requirements imposed by the prior decisions of this Court.

I

Since there is no opinion accompanying the denial of the requested stay, a brief review of the events leading up to this application is necessary.

While in the process of robbing a cashier at a Las Vegas casino, Jesse Walter Bishop shot an employee and a patron of the casino who tried to prevent the crime. The patron died as a result of the wound. Bishop was charged with nine felony counts, including first-degree murder.

At the January 13, 1978, arraignment, Bishop stated that he wished to represent himself, to discharge the public defenders assigned to him, and to plead guilty to all charges. On January 23, 1978, after hearing testimony from three court-appointed psychiatrists, the trial judge found Bishop to be competent. The judge informed Bishop that the maximum sentence for first-degree murder was death and suggested that *pro se* representation was ill-advised. Nevertheless, Bishop insisted on discharging the public defenders. Relying on *Faretta* v. *California*, 422 U. S. 806 (1975), the judge granted Bishop's motion for self-representation. The judge did ap-

point the public defenders as "standby counsel," however, and informed Bishop that he could confer with them if he wished.

Bishop pleaded guilty to all counts. At the sentencing hearing before a three-judge panel, the State presented evidence of aggravating circumstances. Bishop introduced no evidence in mitigation. Standby counsel sought to present evidence of mitigating circumstances. Bishop, however, refused to agree to the admission of any such evidence. The court acceded to his wishes and did not allow standby counsel to proceed. Finding the existence of aggravating circumstances and noting that Bishop had offered no proof of mitigating circumstances, the court imposed the death penalty.

Bishop initially allowed the public defenders to prosecute an appeal to the Nevada Supreme Court. After the appeal had been filed, however, Bishop sought to have the appeal dismissed and apparently informed the justices of the Nevada court that he wanted to be executed. The court ignored the *pro se* effort, reached the issues raised by the public defenders, and affirmed. The court reasoned that, under *Faretta*, Bishop had the absolute right to represent himself and to decline to introduce any mitigating evidence at the sentencing phase of the capital trial. The court further held that the Nevada death penalty statutes were constitutional because they were similar to the Florida statutes upheld by this Court in *Proffitt* v. *Florida*, 428 U. S. 242 (1976).[1]

[1] Justice Manoukian dissented from the Nevada Supreme Court decision. He argued that a self-represented defendant has no right under *Faretta* to waive his right to present mitigating evidence at the sentencing phase of his trial. The sentencing court's refusal to allow the public defenders to present such evidence, he asserted, constituted state-sanctioned suicide. Furthermore, he contended, society has an overriding Eighth Amendment interest in ensuring that capital punishment is imposed only in appropriate cases. That interest would go unsatisfied in a case such as this, where the sentencer is not presented with all available mitigating evidence and therefore cannot make a rational decision as to the propriety of imposing the death penalty.

On August 1, 1979, the state trial court relieved the public defenders of any further responsibility as Bishop's counsel. Nonetheless, referring to their moral and ethical obligations, they filed this federal habeas corpus petition against Bishop's wishes on August 16. On August 18, at the State's request, Bishop submitted to a psychiatric examination. After a 4-hour interview, the psychiatrist determined that Bishop was competent to waive further litigation. This psychiatric evidence was presented to the Federal District Court by affidavit. Bishop refused the public defenders' request to submit himself to a psychiatrist of their choosing. On August 23, Bishop appeared before the District Court and stated that he did not wish to pursue any further litigation. On the same date, the District Court denied the writ, holding that Bishop had made a valid waiver of his right to pursue federal relief and that therefore the public defenders had no standing to bring this action under *Gilmore* v. *Utah*, 429 U. S. 1012 (1976). On August 24, the Court of Appeals for the Ninth Circuit affirmed.

On August 25, however, Bishop voluntarily appeared before the Nevada Board of Pardons. He told the Board that he would be willing to accept commutation of his sentence to life imprisonment if the Board saw fit to do so. The Board denied commutation by a 5–2 vote.

II

The majority of this Court assumes that Bishop's conduct waives the possibility of a challenge to his execution. In my judgment, however, there can be no such waiver. In *Gilmore* v. *Utah*, *supra*, at 1018. MR. JUSTICE WHITE, in a dissenting opinion in which MR. JUSTICE BRENNAN and I joined, asserted "that the consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment." In my own dissenting opinion, I expressed the view that "the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that

it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments." 429 U. S., at 1019.

Society's independent stake in enforcement of the Eighth Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver.[2] By refusing to pursue his Eighth Amendment claim,[3] Bishop

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[2] Bishop's "competency" to make such a waiver is by no means self-evident to me. He has been a drug addict for a number of years and is presently taking a large daily dosage of tranquilizers. In addition, three factors have combined to put Bishop under extreme stress. First, while making an appearance before the state trial court, Bishop complained bitterly of allegedly inhumane conditions in the Nevada state prison and stated that he would rather die than remain incarcerated. Second, apparently because he is convinced that no legal efforts could result in the vacating of his death sentence, Bishop desires his execution to occur swiftly, so that his family will suffer for the shortest possible period. This concern is the evident motivation behind Bishop's decision to forgo federal habeas corpus proceedings, which he believes would result at most in one or more agonizing stays of execution before the death sentence is finally carried out. Third, Bishop's testimony before the Nevada Board of Pardons reveals that he considers it undignified to ask for mercy. Indeed, he stated that he had refused to take the stand at the sentencing phase of his trial and to allow any member of his family to do so because, in his view, such testimony would have constituted begging for pity for him.

[3] In addition, of course, the majority considers Bishop's conduct as waiving any challenge to the constitutionality of the Nevada statutes under which he was sentenced to death. Not only have these statutes never been reviewed by this Court, it appears that the Court has never before been asked to review a death sentence imposed under them. An execution should not be allowed to proceed until this Court has had the opportunity to review the constitutionality of the statutes under which the sentence of death was imposed. Cf. *Gilmore* v. *Utah*, 429 U. S. 1012, 1017 (1976) (WHITE, J., joined by BRENNAN and MARSHALL, JJ., dissenting); *id.*, at 1019 (MARSHALL, J., dissenting). The Supreme Court of Nevada upheld these statutes because of their supposed similarity to the Florida death penalty statutes upheld in *Proffitt* v. *Florida*, 428 U. S. 242 (1976). To the extent that the Nevada provisions do resemble those Florida statutes, I would strike them down not only because I believe that

has, in effect, sought the State's assistance in committing suicide. Society is not powerless, however, to resist a defendant's effort to prompt the exercise of capital force. As the Supreme Court of Pennsylvania has eloquently recognized in a similar case:

> "The doctrine of waiver developed not only out of a sense of fairness to an opposing party but also as a means of promoting jurisprudential efficiency by avoiding appellate court determinations of issues which the appealing party had failed to preserve. It was not, however, designed to block giving effect to a strong public interest, which itself is a jurisprudential concern. It is evident from the record that [the convicted defendant sentenced to death] personally prefers death to spending the remainder of his life in prison. While this may be a genuine conviction on his part, the waiver concept was never intended as a means of allowing a criminal defendant to choose his own sentence. . . . The waiver rule cannot be exalted to a position so lofty as to require this Court to blind itself to the real issue—the propriety of allowing the state to conduct an illegal execution of a citizen." *Commonwealth* v. *McKenna*, 476 Pa. 428, 441, 383 A. 2d 174, 181 (1978).

Bishop's diligent and conscientious attorneys, who were appointed at trial to represent his interests, are quite capable of litigating the Eighth Amendment questions involved in this case. There is no indication that they would be less vigorous or able advocates than was Gilmore's mother. Cf. *Gilmore* v. *Utah*, 429 U. S., at 1018 (WHITE, J., dissenting); *id.*, at 1020 (BLACKMUN, J., dissenting).

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capital punishment is unconstitutional in all circumstances, but also because in my view the Florida statutes have led to the arbitrary and capricious imposition of capital punishment. See *Gardner* v. *Florida*, 430 U. S. 349, 365–370 (1977) (MARSHALL, J., dissenting).

III

Moreover, the procedures in this case did not even comply with the requirements developed by the joint opinion in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), and its progeny. In 1976, the Court held that capital punishment is not unconstitutional in all circumstances. *Gregg, supra; Proffitt* v. *Florida*, 428 U. S. 242; *Jurek* v. *Texas*, 428 U. S. 262; *Woodson* v. *North Carolina*, 428 U. S. 280. Because "the penalty of death is qualitatively different from a sentence of imprisonment, however long," *Woodson* v. *North Carolina, supra*, at 305 (opinion of STEWART, POWELL, and STEVENS, JJ.), these decisions require sentencing procedures that are carefully designed to ensure that the death penalty will not "be inflicted in an arbitrary and capricious manner," *Gregg* v. *Georgia, supra*, at 188 (opinion of STEWART, POWELL, and STEVENS, JJ.). The Court approved a bifurcated proceeding in capital cases in which, after a guilty verdict has been reached, a sentencing hearing is held in which the State may present evidence of statutorily provided aggravating circumstances and the defendant may present evidence in mitigation. In the sentencing hearing, the sentencing authority must consider the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death," *Woodson*, 428 U. S., at 304, to ensure that "death is the appropriate punishment in a specific case," *id.*, at 305. See *Roberts (Harry)* v. *Louisiana*, 431 U. S. 633, 637 (1977); *Jurek* v. *Texas, supra*, at 271–272.

Indeed, in one of its most recent decisions on the issue, a plurality of this Court focused on the constitutional importance of individualized sentencing in capital cases. *Lockett* v. *Ohio*, 438 U. S. 586, 602–605 (1978) (opinion of BURGER, C. J., joined by STEWART, POWELL, and STEVENS, JJ.). The plurality noted this Court's earlier pronouncement that the sentencing authority's " 'possession of the fullest information pos-

sible concerning the defendant's life and characteristics' is '[h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence. . . .'" *Id.*, at 603 (quoting *Williams* v. *New York*, 337 U. S. 241, 247 (1949)) (emphasis in *Lockett*). The plurality then concluded:

> "Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases. . . . The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." 438 U. S., at 605.

This need for individualized consideration of the capital defendant led the plurality to conclude that "a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Ibid.* As a result, the plurality stated that a death penalty statute that "preclude[s] consideration of relevant mitigating factors" violates the Eighth Amendment. *Id.*, at 608.[4]

In the present case, the defendant Bishop, acting as his own defense counsel, failed to introduce any mitigating evidence at

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[4] I concurred in the result in *Lockett*, reiterating my view that the death penalty is under all circumstances a cruel and unusual punishment prohibited by the Eighth Amendment and, in addition, agreeing with the plurality's determination that the Ohio death penalty statute under review "wholly fail[ed] to recognize the unique individuality of every criminal defendant who comes before its courts." 438 U. S., at 621.

the sentencing hearing. Moreover, he was successful in persuading the sentencing tribunal to refuse to permit his standby counsel to present such evidence. By that action, the sentencing court deprived itself of the very evidence that this Court has deemed essential to the determination whether death was the appropriate sentence. We can have no assurance that the death sentence would have been imposed if the sentencing tribunal had engaged in the careful weighing process that was held to be constitutionally required in *Gregg* v. *Georgia* and its progeny. This Court's toleration of the death penalty has depended on its assumption that the penalty will be imposed only after a painstaking review of aggravating and mitigating factors.[5] In this case, that assumption has proved demonstrably false. Instead, the Court has permitted the State's mechanism of execution to be triggered by an entirely arbitrary factor: the defendant's decision to acquiesce in his own death. In my view, the procedure the Court approves today amounts to nothing less than state-administered suicide. I dissent.

No. A–193 (79–444). FERNOS-LOPEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL. C. A. 1st Cir. Application for stay of proceedings, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

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[5] In addition, my Brethren have considered careful appellate review a requisite to the constitutionality of capital punishment. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 198 (1976). A number of States now have a mandatory appeal procedure for cases in which the death penalty has been imposed. See Ala. Code § 13–11–5 (1977); Ariz. Rule Crim. Proc. 31.2 (b); Cal. Penal Code Ann. § 1239 (b) (West Supp. 1979); Del. Code Ann., Tit. 11, § 4209 (g) (Supp. 1978); Fla. Stat. § 921–141 (4) (1977); Ga. Code § 27–2537 (a) (1978); Idaho Code § 19–2827 (1979); Ill. Rev. Stat., ch. 38, § 9–1 (i) (1977); La. Code Crim. Proc. Ann., Art. 905.9 (West Supp. 1979); Md. Ann. Code, Art. 27, § 414 (Supp. 1978); Neb. Rev. Stat. § 29–2525 (1975); N. H. Rev. Stat. Ann. § 630:5 (VI) (Supp. 1977); Okla. Stat., Tit. 21, § 701.13 (Supp. 1978); 18 Pa. Cons. Stat. § 1311 (h) (1978); S. C. Code § 18–9–20 (1976); Va. Code § 17–110.1 (Supp. 1979); Wyo. Stat. § 6–4–103 (1977).

No. D–153. IN RE DISBARMENT OF OLITT. Disbarment entered. [For earlier order herein, see 439 U. S. 1042.]

No. 5, Orig. UNITED STATES *v.* CALIFORNIA. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 439 U. S. 30.]

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Supplemental Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, 423 U. S. 909.]

No. 81, Orig. KENTUCKY *v.* INDIANA ET AL. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the report may be filed by the parties within 30 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 441 U. S. 941.]

No. 78–119. WASHINGTON ET AL. *v.* UNITED STATES ET AL., 443 U. S. 658. Upon consideration of the motion of the State of Washington for modification of the opinion of this Court, the memorandum filed by the respondent tribes, the memorandum filed by the United States and the reply thereto, it is ordered that footnote 16 of the opinion be modified as follows:

> "A factual dispute exists on the question of what percentage of the fish in the case area actually passes through Indian fishing areas and is therefore subject to the District Court's allocations. In the absence of any

relevant findings by the courts below, we are unable to express any view on the matter." *

No. 78–160. WILSON ET AL. *v.* OMAHA INDIAN TRIBE ET AL.; and

No. 78–161. IOWA ET AL. *v.* OMAHA INDIAN TRIBE ET AL., 442 U. S. 653. Motion of Maine et al. for leave to file a brief as *amici curiae* granted. Motion for modification of the opinion denied. MR. JUSTICE POWELL took no part in the consideration or decision of these motions.

No. 78–599. SECRETARY OF THE NAVY ET AL. *v.* HUFF ET AL.; and

No. 78–1006. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES. C. A. D. C. Cir. [Certiorari granted, 440 U. S. 957.] Motion of the Solicitor General to consolidate these cases for oral argument denied.

No. 78–630. WASHINGTON ET AL. *v.* CONFEDERATED TRIBES OF THE COLVILLE INDIAN RESERVATION ET AL.; and WASHINGTON *v.* UNITED STATES ET AL. Appeal from D. C. E. D. Wash. [Probable jurisdiction postponed, 440 U. S. 905.] Motion of the All Indian Pueblo Council, Inc., for leave to file a brief as *amicus curiae* granted.

No. 78–857. NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY; and

No. 78–997. YESHIVA UNIVERSITY FACULTY ASSN. *v.* YESHIVA UNIVERSITY. C. A. 2d Cir. [Certiorari granted, 440 U. S. 906.] Motion of National Society of Professional Engineers for leave to file a brief as *amicus curiae* granted.

No. 78–959. PERRIN *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 440 U. S. 956.] Motion of petitioner for divided argument denied.

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*[REPORTER'S NOTE: The opinion is reported as so amended at 443 U. S. 658.]

No. 78–911. INDUSTRIAL UNION DEPARTMENT, AFL–CIO *v.* AMERICAN PETROLEUM INSTITUTE ET AL.; and

No. 78–1036. MARSHALL, SECRETARY OF LABOR *v.* AMERICAN PETROLEUM INSTITUTE ET AL. C. A. 5th Cir. [Certiorari granted, 440 U. S. 906.] Motion of Joseph Cimino et al. for leave to file a brief as *amici curiae* granted.

No. 78–1088. KISSINGER *v.* REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL.; and

No. 78–1217. REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS ET AL. *v.* KISSINGER. C. A. D. C. Cir. [Certiorari granted, 441 U. S. 904.] Motion of the Solicitor General for additional time for oral argument granted and 15 additional minutes are allotted for oral argument in these cases.

No. 78–1248. GTE SYLVANIA, INC., ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. C. A. D. C. Cir. [Certiorari granted, 441 U. S. 942.] Motion of the Solicitor General for additional time for oral argument granted, and five additional minutes allotted for that purpose. The nonfederal respondent also allotted an additional five minutes for oral argument.

No. 78–1422. RETIREMENT FUND TRUST OF THE PLUMBING, HEATING & PIPING INDUSTRY OF SOUTHERN CALIFORNIA *v.* JOHNS. Ct. App. Cal., 4th App. Dist.;

No. 78–1445. SOUTHERN CALIFORNIA IBEW–NECA PENSION PLAN ET AL. *v.* JOHNSTON ET VIR. Ct. App. Cal., 2d App. Dist.;

No. 78–1841. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS. C. A. 3d Cir.;

No. 79–88. CALIFORNIA *v.* WHYTE. Ct. App. Cal., 1st App. Dist.; and

No. 79–101. BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* SWIFT ET AL. C. A. 2d Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 78–1318. O'BANNON, SECRETARY OF PUBLIC WELFARE OF PENNSYLVANIA *v.* TOWN COURT NURSING CENTER ET AL. C. A. 3d Cir. [Certiorari granted, 441 U. S. 904.] Motion of the Solicitor General for divided argument granted. Motion of the Legal Aid Society of New York City et al. for leave to file a brief as *amici curiae* granted.

No. 78–1501. MCLAIN ET AL. *v.* REAL ESTATE BOARD OF NEW ORLEANS, INC., ET AL. C. A. 5th Cir. [Certiorari granted, 441 U. S. 942.] Motion of Consumers Union of the United States, Inc., for leave to file a brief as *amicus curiae* granted. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted. Ten additional minutes allotted for oral argument and the time is allocated as follows: Petitioners, 20 minutes; Solicitor General, 15 minutes; and respondents, 35 minutes.

No. 78–1651. SEATRAIN SHIPBUILDING CORP. ET AL. *v.* SHELL OIL CO. ET AL. C. A. D. C. Cir. [Certiorari granted, 442 U. S. 940.] Motion of the Solicitor General for additional time for oral argument granted, and five additional minutes allotted for that purpose. The nonfederal respondents also allotted an additional five minutes for oral argument.

No. 78–1789. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Sup. Ct. La. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE STEWART took no part in the consideration or decision of this matter.

No. 78–1840. CITY OF ROME ET AL. *v.* UNITED STATES ET AL. D. C. D. C. [Probable jurisdiction noted, 443 U. S. 914.] Motion of Pacific Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 78–5937. YBARRA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. [Probable jurisdiction noted, 440 U. S. 970.] Motion of Ralph Ruebner, Esquire, to permit Alan D. Goldberg, Esquire, to present oral argument *pro hac vice* granted.

No. 78–6020. BUSIC *v.* UNITED STATES; and

No. 78–6029. LAROCCA *v.* UNITED STATES. C. A. 3d Cir. [Certiorari granted, 442 U. S. 916.] Motions for appointment of counsel granted, and it is ordered that Samuel J. Reich, Esquire, of Pittsburgh, Pa., be appointed to serve as counsel for petitioner in No. 78–6020, and that Michael A. Litman, Esquire, of Pittsburgh, Pa., be appointed to serve as counsel for petitioner in No. 78–6029.

No. 78–6933. SIMON *v.* COURT OF CRIMINAL APPEALS OF TEXAS ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 78–6657. SAYLES *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL. Motion for leave to file petition for writ of certiorari and/or mandamus denied.

No. 78–1921. LECHT *v.* LECHT ET AL.;

No. 78–6780. NELSON *v.* ANDERSON, WARDEN;

No. 78–6813. FULLER *v.* ALABAMA BOARD OF CORRECTIONS ET AL.;

No. 79–166. ERNEST *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT;

No. 79–188. ERNEST *v.* SIRICA, U. S. DISTRICT JUDGE, ET AL.;

No. 79–5036. MAGEE *v.* MORRIS, WARDEN;

No. 79–5159. MCINTYRE *v.* WARDEN, KILBY CORRECTION FACILITY; and

No. 79–5200. MCCRARY *v.* SMITH, CORRECTIONAL SUPERINTENDENT, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 78–6733. BARNETT ET UX. *v.* COX, U. S. DISTRICT JUDGE, ET AL.;

No. 78–6856. MAGEE *v.* WILKINS, U. S. DISTRICT JUDGE, ET AL.;

No. 78–6860. FLANAGAN *v.* U. S. COURT OF APPEALS FOR THE FIFTH CIRCUIT ET AL.;

No. 79–31. COX *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL.;

No. 79–5053. GREEN ET AL. *v.* HUNTER, U. S. DISTRICT JUDGE, ET AL.;

No. 79–5094. POWELL *v.* MALABUYO, DEPUTY CLERK, U. S. COURT OF APPEALS FOR THE NINTH CIRCUIT, ET AL.; and

No. 79–5095. DAVIS *v.* BRYAN, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 78–6686. DAVIS ET AL. *v.* HUNTER, U. S. DISTRICT JUDGE, ET AL.;

No. 78–6795. JONES *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL.; and

No. 79–75. KNIGHT ET AL. *v.* HEANEY, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus and/or prohibition denied.

No. 79–5083. INTERSIMONE *v.* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 78–6739. MAY *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of prohibition denied.

No. 79–5181. DAVIS *v.* RUSSELL ET AL., U. S. CIRCUIT JUDGES. Motion for leave to file petition for writ of prohibition and/or mandamus denied.

Probable Jurisdiction Noted

No. 79–45. LEWIS, COMPTROLLER OF FLORIDA *v.* BT INVESTMENT MANAGERS, INC., ET AL. Appeal from D. C. N. D. Fla. Probable jurisdiction noted. Reported below: 461 F. Supp. 1187.

No. 79–134. CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted. Reported below: 47 N. Y. 2d 94, 390 N. E. 2d 749.

No. 78–1604. CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION. Appeal from Sup. Ct. Ariz. Probable jurisdiction noted, and case set for oral argument in tandem with No. 78–1177, *White Mountain Apache Tribe* v. *Bracker* [certiorari granted, *infra*, p. 823]. Reported below: 121 Ariz. 183, 589 P. 2d 426.

Certiorari Granted

No. 78–1693. UNITED STATES *v.* CLARKE ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 590 F. 2d 765.

No. 78–1729. UNITED STATES *v.* PAYNER. C. A. 6th Cir. Certiorari granted. Reported below: 590 F. 2d 206.

No. 78–1779. OWEN *v.* CITY OF INDEPENDENCE, MISSOURI, ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 589 F. 2d 335.

No. 78–1793. ROBERTS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari granted. Reported below: 195 U. S. App. D. C. 1, 600 F. 2d 815.

No. 78–1815. ANDRUS, SECRETARY OF THE INTERIOR *v.* SHELL OIL CO. ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 591 F. 2d 597.

No. 78–1821. UNITED STATES *v.* MENDENHALL. C. A. 6th Cir. Certiorari granted. Reported below: 596 F. 2d 706.

No. 78–1845. ILLINOIS *v.* VITALE. Sup. Ct. Ill. Certiorari granted. Reported below: 71 Ill. 2d 229, 375 N. E. 2d 87.

No. 78–1862. WALKER *v.* ARMCO STEEL CORP. C. A. 10th Cir. Certiorari granted. Reported below: 592 F. 2d 1133.

No. 78–1870. WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. Certiorari granted. Reported below: 593 F. 2d 715.

No. 78–1918. HARRISON, REGIONAL ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* PPG INDUSTRIES, INC., ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 587 F. 2d 237.

No. 79–105. CURTISS-WRIGHT CORP. *v.* GENERAL ELECTRIC CO. C. A. 3d Cir. Certiorari granted. Reported below: 597 F. 2d 35.

No. 78–1177. WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* BRACKER ET AL. Ct. App. Ariz. Certiorari granted limited to Questions 1, 2, and 5 presented by the petition, and case set for oral argument in tandem with No. 78–1604, *Central Machinery Co.* v. *Arizona State Tax Commission* [probable jurisdiction noted, *supra*, p. 822]. Reported below: 120 Ariz. 282, 585 P. 2d 891.

No. 78–1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. Certiorari granted. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 85 Cal. App. 3d 763, 149 Cal. Rptr. 750.

No. 78–1832. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* SULLIVAN. C. A. 3d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 593 F. 2d 512.

No. 78–1874. MASSACHUSETTS *v.* MEEHAN. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 377 Mass. 552, 387 N. E. 2d 527.

No. 78–1888. MAHER, COMMISSIONER OF INCOME MAINTENANCE OF CONNECTICUT *v.* GAGNE. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 594 F. 2d 336.

No. 79–8. UNITED STATES *v.* RADDATZ. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 592 F. 2d 976.

No. 79–121. UNITED STATES *v.* HENRY. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 590 F. 2d 544.

No. 78–6809. JENKINS *v.* ANDERSON, WARDEN. C. A. 6th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 599 F. 2d 1055.

No. 79–97. CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL. Ct. App. Cal., 3d App. Dist. Certiorari granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this petition. Reported below: 90 Cal. App. 3d 979, 153 Cal. Rptr. 757.

Certiorari Denied. (See also Nos. 78–1671, 78–1833, 78–6645, 78–6743, 78–6765, 78–6768, 78–6771, 78–6875, 78–6876, 78–6896, 78–6904, 79–5072, and 79–5100, *supra.*)

No. 78–1218. SMITH *v.* MICHOT, SUPERINTENDENT OF EDUCATION OF LOUISIANA. C. A. 5th Cir. Certiorari denied. Reported below: 583 F. 2d 540.

No. 78–1351. INDIANA & MICHIGAN ELECTRIC CO. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–1386. SHERMAN *v.* AMERICAN FEDERATION OF MUSICIANS. C. A. 10th Cir. Certiorari denied. Reported below: 588 F. 2d 1313.

No. 78–1402. WILBOURN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 364 So. 2d 995.

No. 78–1407. BOONE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 364 So. 2d 978.

No. 78–1423. OLITT *v.* MURPHY, JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1331.

No. 78–1449. HARTMAN ET AL. *v.* VIRGINIA. Cir. Ct. Prince William County, Va. Certiorari denied.

No. 78–1462. WHAT IT IS, INC., ET AL. *v.* JACKSON, MAYOR OF ATLANTA, ET AL. Ct. App. Ga. Certiorari denied. Reported below: 146 Ga. App. 574, 246 S. E. 2d 693.

No. 78–1468. FIRST NATIONAL BANK OF PEORIA *v.* CHILDS. C. A. 7th Cir. Certiorari denied. Reported below: 583 F. 2d 918.

No. 78–1494. STOVALL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–1498. MICHEL ET AL. *v.* UNITED STATES; and
No. 78–6412. BELMARES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 986.

No. 78–1499. MILESTONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1506. MACE *v.* MATTHEWS, MAYOR OF NEWBURYPORT. Sup. Jud. Ct. Mass. Certiorari denied.

No. 78–1512. SCHWARTZ *v.* GILSTER, SHERIFF. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 341.

No. 78–1518. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 200.

No. 78–1520. ALABAMA HOSPITAL ASSN. ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 762.

No. 78–1526. ABEL ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 78–1538. CALLAHAN ET AL. *v.* KIMBALL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 590 F. 2d 768.

No. 78–1539. KEAUKAHA-PANAEWA COMMUNITY ASSN. ET AL. *v.* HAWAIIAN HOMES COMMISSION ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 588 F. 2d 1216.

No. 78–1540. GREENWALD *v.* CITY OF NORTH MIAMI BEACH, FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 779.

No. 78–1547. SUN OIL COMPANY OF PENNSYLVANIA *v.* MARSHALL, SECRETARY OF LABOR. C. A. 10th Cir. Certiorari denied. Reported below: 592 F. 2d 563.

No. 78–1551. ETHIER *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 733.

No. 78–1561. CALLAHAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1078.

No. 78–1567. HOLLEMAN *v.* UNITED STATES;
No. 78–1568. WINDERS *v.* UNITED STATES;
No. 78–1569. EDWARDS *v.* UNITED STATES; and
No. 78–1570. HARRIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 591 F. 2d 1340.

No. 78–1571. WOO *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 224, 590 F. 2d 356.

No. 78–1573. JOHNSON *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 78–1581. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 78–1584. MILL *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 585 P. 2d 546.

No. 78–1586. WINKLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 705.

No. 78–1596. LOPEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 67 App. Div. 2d 624, 411 N. Y. S. 2d 627.

No. 78–1597. CERTIFIED GROCERS OF CALIFORNIA, LTD. *v.* LEYVA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 2d 857.

No. 78–1606. GOUGER ET VIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 101.

No. 78–1607. MARYLAND LUMBER CO. *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 419.

No. 78–1608. WARDELL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 571 S. W. 2d 952.

No. 78–1609. GOINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 88.

No. 78–1616. ROGERS ET AL. *v.* BROCKETTE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1057.

No. 78–1617. BAY MEDICAL CENTER, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 1174.

No. 78–1623. FOWLER *v.* STRICKLAND, REVENUE COMMISSIONER OF GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 30, 252 S. E. 2d 459.

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No. 78–1625. STONES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–1627. CRAMER *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 64 Ill. App. 3d 688, 381 N. E. 2d 827.

No. 78–1628. HANRAHAN ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 64 Ill. App. 3d 207, 380 N. E. 2d 1075.

No. 78–1631. BERLIN *v.* NATHAN ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 64 Ill. App. 3d 940, 381 N. E. 2d 1367.

No. 78–1632. R. M. SMITH, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 248.

No. 78–1633. HALLMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 198.

No. 78–1634. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* SOLIEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 82.

No. 78–1637. SHANAHAN *v.* BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEW JERSEY ET AL. Super. Ct. N. J. Certiorari denied.

No. 78–1639. MORRISON ET AL. *v.* STETSON, SECRETARY OF THE AIR FORCE. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 225, 590 F. 2d 356.

No. 78–1642. ST. REGIS PAPER CO. *v.* MARSHALL, SECRETARY OF LABOR, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 591 F. 2d 612.

No. 78–1644. KANE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 78–1647. L. H. Feder Corp., dba Pioneer Institutional Trading Co. *v.* Atlantic Overseas Corp. C. A. 2d Cir. Certiorari denied. Reported below: 594 F. 2d 851.

No. 78–1648. Jarecki et al. *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 670.

No. 78–1652. Hodder et al. *v.* United States Nuclear Regulatory Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 212, 589 F. 2d 1115.

No. 78–1656. Independent Stave Co., Diversified Industries Division *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. Reported below: 591 F. 2d 443.

No. 78–1658. Gordon *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–1663. New York State Teamsters Conference Pension and Retirement Fund et al. *v.* Pension Benefit Guaranty Corp. et al. C. A. D. C. Cir. Certiorari denied. Reported below: 192 U. S. App. D. C. 344, 591 F. 2d 953.

No. 78–1667. Citizens Bank & Trust Company of Park Ridge, Illinois *v.* Federal Deposit Insurance Corp. C. A. 7th Cir. Certiorari denied. Reported below: 592 F. 2d 364.

No. 78–1668. Byrd et al. *v.* City of San Antonio, Texas, et al. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 184.

No. 78–1669. Fox et al. *v.* General Telephone Company of Wisconsin. Ct. App. Wis. Certiorari denied. Reported below: 85 Wis. 2d 698, 271 N. W. 2d 161.

No. 78–1670. Millen *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 1085.

No. 78–1672. BOISE CASCADE CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO, LOCAL UNION No. 7001. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 127.

No. 78–1673. MARENGO COUNTY BOARD OF EDUCATION *v.* LEE ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1134.

No. 78–1674. L. W. BENNETT & SONS, INC. *v.* ANICHINAPEO ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 105, 411 N. Y. S. 2d 414.

No. 78–1677. PACIFIC LEGAL FOUNDATION ET AL. *v.* DEPARTMENT OF TRANSPORTATION. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 184, 593 F. 2d 1338.

No. 78–1679. CANAL BARGE CO., INC. *v.* PPG INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 592 F. 2d 138.

No. 78–1682. FORAN *v.* METZ, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–1685. CBS INC. *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–1686. HOFFMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1209.

No. 78–1687. WHITE *v.* OFFICE OF PERSONNEL MANAGEMENT ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 191 U. S. App. D. C. 190, 589 F. 2d 713.

No. 78–1690. UNION BANK *v.* BLOOR, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 592 F. 2d 134.

No. 78–1692. SOLOMON *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 78–1694. C. DOUGLAS WILSON & Co. *v.* INSURANCE COMPANY OF NORTH AMERICA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 590 F. 2d 1275.

No. 78–1696. DAYTON HYDRAULIC CO. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 592 F. 2d 937.

No. 78–1698. DE TENORIO ET AL. *v.* LIGHTSEY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 911.

No. 78–1699. AYERS ET AL. *v.* SPARTAN GRAIN & MILL CO. C. A. 5th Cir. Certiorari denied. Reported below: 581 F. 2d 419.

No. 78–1700. CONROY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 1258.

No. 78–1705. MCCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied.

No. 78–1706. CROUCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 78–1707. DALY *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 202 Neb. 217, 274 N. W. 2d 557.

No. 78–1708. SHAPIRO *v.* COLUMBIA UNION NATIONAL BANK & TRUST CO. ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 576 S. W. 2d 310.

No. 78–1709. JACKSON ET AL. *v.* GEORGIA. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 78–1701. PARKER, TRUSTEE IN BANKRUPTCY *v.* KLOCHKO EQUIPMENT RENTAL CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 649.

No. 78–1714. POSTAL ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 862.

No. 78–1716. 21ST PHOENIX CORP. ET AL. *v.* ENGLISH ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 590 F. 2d 723.

No. 78–1717. DOTTINO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1214.

No. 78–1719. SKEHAN *v.* BOARD OF TRUSTEES OF BLOOMSBURG STATE COLLEGE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 590 F. 2d 470.

No. 78–1721. WLLE, INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied.

No. 78–1722. BENNER ET AL. *v.* OSWALD ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 592 F. 2d 174.

No. 78–1725. ARTICLES OF FOOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 78–1726. SOUTHARD ET AL. *v.* FORBES, INC. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 140.

No. 78–1727. FRESNO UNIFIED SCHOOL DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 1088.

No. 78–1730. SMITH *v.* FEDERAL DEPOSIT INSURANCE CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 78–1731. NEW MEXICO ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 590 F. 2d 323.

No. 78–1732. H. RAY BAKER, INC., ET AL. *v.* ASSOCIATED BANKING CORP. C. A. 9th Cir. Certiorari denied. Reported below: 592 F. 2d 550.

No. 78–1734. GOLOMB *v.* WADSWORTH. C. C. P. A. Certiorari denied. Reported below: 592 F. 2d 1184.

No. 78–1740. LUBBOCK POSTER CO. *v.* CITY OF LUBBOCK, TEXAS, ET AL. Ct. Civ. App. Tex., 7th Sup. Jud. Dist. Certiorari denied. Reported below: 569 S. W. 2d 935.

No. 78–1741. ALABAMA *v.* ZUCK. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 436.

No. 78–1742. WOLF *v.* ILLINOIS; and
No. 78–1744. BERLAND *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 286, 385 N. E. 2d 649.

No. 78–1745. SIMKO, ADMINISTRATOR, ET AL. *v.* C & C MARINE MAINTENANCE CO. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 960.

No. 78–1746. DIAZ-BUXO *v.* MONGE, CHIEF JUSTICE, SUPREME COURT OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 593 F. 2d 153.

No. 78–1747. UNITED STATES BREWERS ASSN., INC., ET AL. *v.* PEREZ, SECRETARY, DEPARTMENT OF TREASURY OF PUERTO RICO, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 2d 1212.

No. 78–1748. LEAVITT ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 599 F. 2d 355.

No. 78–1751. MCPARTLIN *v.* UNITED STATES;
No. 78–1754. BULL *v.* UNITED STATES;
No. 78–1755. JANICKI *v.* UNITED STATES; and
No. 78–1903. INGRAM *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 595 F. 2d 1321.

No. 78–1753. TOOKE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–1757. RENZ ET AL. *v.* BEEMAN, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 589 F. 2d 735.

No. 78–1758. BRICKLAYERS FRINGE BENEFIT FUNDS, METROPOLITAN AREA, ET AL. *v.* NORTH PERRY BAPTIST CHURCH OF PONTIAC ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 207.

No. 78–1759. HELM, GUARDIAN AD LITEM *v.* PACIFIC POWER & LIGHT CO. ET AL. C. A. 9th Cir. Certiorari denied.

No. 78–1760. OREGON *v.* FONDREN. Sup. Ct. Ore. Certiorari denied. Reported below: 285 Ore. 361, 591 P. 2d 1374.

No. 78–1764. RYAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 78–1766. MENDOLA ET AL. *v.* LEES CARPETS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 337.

No. 78–1767. WILMINGTON TRUST CO. *v.* PENN CENTRAL TRANSPORTATION CO. C. A. 3d Cir. Certiorari denied. Reported below: 596 F. 2d 1127.

No. 78–1768. ROWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 98.

No. 78–1769. NICKOLS *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: See 585 S. W. 2d 414.

No. 78–1770. KAYE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 595 F. 2d 1121.

No. 78–1771. WEIBEL *v.* CLARK, DBA CLARK BUILDING, ET AL. Sup. Ct. Wis. Certiorari denied. Reported below: 87 Wis. 2d 696, 275 N. W. 2d 686.

No. 78–1773. BECKFORD ET AL. *v.* DADE COUNTY SCHOOL BOARD. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 501.

No. 78–1774. ADAMS ET AL. *v.* UNITED STATES ET AL. Temp. Emerg. Ct. App. Certiorari denied.

No. 78–1775. SCHAFER ET AL. *v.* PENN CENTRAL CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 596 F. 2d 1155.

No. 78–1776. KEY *v.* PENN CENTRAL CORP. ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–1777. BREWERY DRIVERS & HELPERS LOCAL No. 133 *v.* GREY EAGLE DISTRIBUTORS, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 288.

No. 78–1778. MOORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 865.

No. 78–1781. IN RE LEFKOWITZ. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 213.

No. 78–1782. BOWLING *v.* MATHEWS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 587 F. 2d 229.

No. 78–1783. SIMONS ET UX. *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 251.

No. 78–1784. MANSION HOUSE CENTER NORTH REDEVELOPMENT CO. ET AL. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 653.

No. 78–1785. GROGAN ET AL. *v.* KENTUCKY ET AL. Sup. Ct. Ky. Certiorari denied. Reported below: 577 S. W. 2d 4.

No. 78–1787. BARBER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1242.

No. 78–1788. HENRY POLLAK, INC., ET AL. *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 217, 593 F. 2d 1371.

No. 78–1790. DAVIS *v.* GENERAL MOTORS CORP. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 840.

No. 78–1792. WORNOCK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 595 F. 2d 1121.

No. 78–1794. COUGHLIN, COMMISSIONER, NEW YORK STATE OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES, ET AL. *v.* NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 2d 27.

No. 78–1795. HARDWICK *v.* NU-WAY OIL CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 806.

No. 78–1796. GRAHAM ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–1797. NEWHOUSE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–1798. BLUE DIAMOND COAL CO. *v.* BOGGS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 655.

No. 78–1800. LOUCHHEIM *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 296 N. C. 314, 250 S. E. 2d 630.

No. 78–1802. AMERICAN MOTORS SALES CORP. *v.* DIVISION OF MOTOR VEHICLES OF VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 592 F. 2d 219.

No. 78–1805. MCTIGHE *v.* UNIVERSITY OF THE AMERICAS FOUNDATION, INC., ET AL. Ct. App. Ky. Certiorari denied. Reported below: 581 S. W. 2d 365.

No. 78–1806. BRANDON ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 112.

No. 78–1807. AULT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 148 Ga. App. 761, 252 S. E. 2d 668.

No. 78–1809. PEREZ *v.* STEVENS. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 362 So. 2d 998.

No. 78–1810. WEST *v.* JANING, SHERIFF. Sup. Ct. Neb. Certiorari denied. Reported below: 202 Neb. 141, 274 N. W. 2d 161.

No. 78–1813. SLOAN *v.* RAICHLE, TRUSTEE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–1814. MELVIN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 596 F. 2d 492.

No. 78–1816. PARNESS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 595 F. 2d 1209.

No. 78–1817. FORD MOTOR CREDIT CO. *v.* COLONIAL FORD, INC.; and

No. 78–1818. FORD MOTOR CO. *v.* COLONIAL FORD, INC. C. A. 10th Cir. Certiorari denied. Reported below: 592 F. 2d 1126.

No. 78–1820. ASSOCIATED THIRD CLASS MAIL USERS *v.* UNITED STATES POSTAL SERVICE ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 10, 600 F. 2d 824.

No. 78–1822. VILA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 21.

No. 78–1823. TEAMSTERS LOCAL UNION No. 30 ET AL. *v.* HELMS EXPRESS, INC., A DIVISION OF RYDER TRUCK LINES, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 211.

No. 78–1824. IN RE SCHULMAN. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 78–1825. LIBERTY LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 21.

No. 78–1826. RESETAR *v.* STATE BOARD OF EDUCATION OF MARYLAND ET AL. Ct. App. Md. Certiorari denied. Reported below: 284 Md. 537, 399 A. 2d 225.

No. 78–1827. MOORE *v.* MOORE. Ct. App. D. C. Certiorari denied. Reported below: 398 A. 2d 32.

No. 78–1829. MIKE ET AL. *v.* SIGMA NU FRATERNITY ET AL. Ct. App. Ind. Certiorari denied.

No. 78–1830. IAMPIERI *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 78–1831. HESSTON CORP. *v.* DEERE & CO. C. A. 10th Cir. Certiorari denied. Reported below: 593 F. 2d 956.

No. 78–1834. MUÑIZ ET AL. *v.* SOUTH PUERTO RICO SUGAR CORP. ET AL. Super. Ct. P. R., Ponce Sec. Certiorari denied.

No. 78–1835. WOLD *v.* WOLD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 593.

No. 78–1837. ELLIS ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 154.

No. 78–1842. GOLDMAN *v.* MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.; and GOLDMAN *v.* MEREDITH, CHIEF JUDGE, U. S. DISTRICT COURT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 129 (first case); 596 F. 2d 1353 (second case).

No. 78–1843. SCHONWALD *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 78–1844. UNION ELECTRIC CO. *v.* ENVIRONMENTAL PROTECTION AGENCY. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 299.

No. 78–1846. STOVALL ET AL. *v.* PATTERSON ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 590 F. 2d 338.

No. 78–1847. GERACI *v.* ST. XAVIER HIGH SCHOOL ET AL. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 78–1848. UNITED STATES EX REL. PETROFSKY *v.* VAN COTT, BAGLEY, CORNWALL & MCCARTHY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 588 F. 2d 1327.

No. 78–1851. HARRIS *v.* H. SCHULDT REEDEREI. C. A. 4th Cir. Certiorari denied.* Reported below: 596 F. 2d 92.

No. 78–1853. MCDONNELL DOUGLAS CORP. *v.* GENERAL TELEPHONE COMPANY OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 720.

No. 78–1857. BLASI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 594.

No. 78–1858. NATIONAL CAUCUS OF LABOR COMMITTEES ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW). C. A. 2d Cir. Certiorari denied.

No. 78–1859. GREY LINE AUTO PARTS, INC. *v.* THARP ET. AL. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 616.

No. 78–1860. LEAVITT *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 369 So. 2d 993.

No. 78–1861. MIKE YUROSEK & SONS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 661.

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*[REPORTER'S NOTE: This order was vacated on May 4, 1981. 451 U. S. 965.]

No. 78–1863. PEREZ, SECRETARY OF THE TREASURY OF PUERTO RICO, ET AL. *v.* RODRIGUEZ DE QUIÑONEZ ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 596 F. 2d 486.

No. 78–1864. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 2d 1330.

No. 78–1865. MCCABE *v.* GREENBERG; and
No. 78–1875. MCCABE *v.* GREENBERG. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 854.

No. 78–1866. INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE No. 82 *v.* DETROIT COIL CO. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 575.

No. 78–1867. AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* IOWA BEEF PROCESSORS, INC. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 1138.

No. 78–1868. LEMELSON *v.* CENTSABLE PRODUCTS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 591 F. 2d 400.

No. 78–1869. REHAHN ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1225.

No. 78–1872. BRIGHTON BUILDING & MAINTENANCE CO. ET AL. *v.* UNITED STATES; and
No. 79–111. PALUMBO EXCAVATING CO. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 598 F. 2d 1101.

No. 78–1876. DEL RIO DISTRIBUTORS, INC. *v.* ADOLPH COORS CO. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 176.

No. 78–1873. GABAUER ET AL. *v.* WOODCOCK ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 662.

No. 78–1877. VISERTO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 2d 531.

No. 78–1879. GALANTE ET AL. *v.* STEEL CITY NATIONAL BANK OF CHICAGO ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 476, 384 N. E. 2d 57.

No. 78–1880. BOARD OF ASSESSORS OF THE CITY OF BOSTON *v.* TREGOR, TRUSTEE. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 377 Mass. 602, 387 N. E. 2d 538.

No. 78–1883. EXECUTIVE JET AVIATION, INC. *v.* BOYLE, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 78–1884. LERNER, ADMINISTRATOR *v.* HAAS ET AL. Sup. Ct. Pa. Certiorari denied.

No. 78–1885. DELAPLANE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 88 Cal. App. 3d 223, 151 Cal. Rptr. 843.

No. 78–1886. SIRICO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–1887. SMITH *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF THE SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 134, 387 N. E. 2d 316.

No. 78–1889. BUTLER ET AL. *v.* GOLDBLATT BROS., INC., ET AL.; and

No. 78–1908. KOWALSKI ET AL. *v.* BUTLER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 589 F. 2d 323.

No. 78–1890. FRISSELL *v.* RIZZO, MAYOR OF PHILADELPHIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 597 F. 2d 840.

No. 78–1891. LATTIMORE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1151.

No. 78–1892. CHAMBERLAIN *v.* KURTZ, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 827.

No. 78–1893. BIRELINE *v.* SEAGONDOLLAR ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 567 F. 2d 260.

No. 78–1894. FORT PIERCE UTILITIES AUTHORITY OF THE CITY OF FORT PIERCE ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 79, 606 F. 2d 986.

No. 78–1895. SENDAK, ATTORNEY GENERAL OF INDIANA *v.* CITIZENS ENERGY COALITION OF INDIANA, DBA CITIZENS ACTION COALITION OF INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 1158.

No. 78–1896. KAHN ET AL. *v.* EAST BAY MUNICIPAL UTILITY DISTRICT. Sup. Ct. Cal. Certiorari denied. Reported below: 23 Cal. 3d 839, 591 P. 2d 1249.

No. 78–1897. HAK YUNG SZE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–1898. ATLANTIC RICHFIELD CO. ET AL. *v.* NEWMAN OIL CO. ET AL.; and

No. 78–1906. ALKEK ET AL. *v.* NEWMAN OIL CO. ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 597 F. 2d 275.

No. 78–1899. DEMOSS ET AL. *v.* INDIAN HEAD, INC. Sup. Ct. Del. Certiorari denied. Reported below: 397 A. 2d 1378.

No. 78–1901. HERSCHENSOHN ET AL. *v.* HOFFMAN ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 2d 893.

No. 78–1900. SMYER ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 F. 2d 939.

No. 78–1910. DAVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1049.

No. 78–1911. ROBERT L. GUYLER CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 219 Ct. Cl. 403, 593 F. 2d 406.

No. 78–1912. PAPPAS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 360, 383 N. E. 2d 1190.

No. 78–1915. YAFFE IRON & METAL CORP. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 832.

No. 78–1916. TONKA *v.* AMERICAN TELEPHONE & TELEGRAPH CO. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1189.

No. 78–1919. DAVILA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1261.

No. 78–1920. EISENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 596 F. 2d 522.

No. 78–1923. KITCHIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 900.

No. 78–1925. MILLER & SON PAVING, INC. *v.* WRIGHTSTOWN TOWNSHIP CIVIC ASSN. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1213.

No. 78–1926. SCHREIBER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 534.

No. 78–1927. GENOVESE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 65 Ill. App. 3d 819, 382 N. E. 2d 872.

No. 78–1928. STUART, Co-TRUSTEE, ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, Co-TRUSTEE, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 22, 387 N. E. 2d 312.

No. 78–1929. BRODY *v.* MONTALBANO ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 87 Cal. App. 3d 725, 151 Cal. Rptr. 206.

No. 78–1930. THEODORE D. BROSS LINE CONSTRUCTION CORP. *v.* WENDELL, SECRETARY OF REVENUE OF SOUTH DAKOTA. C. A. 2d Cir. Certiorari denied.

No. 78–1932. NORTHERN ILLINOIS AUTOMOBILE WRECKERS & REBUILDERS ASSN. ET AL. *v.* DIXON, SECRETARY OF STATE OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 53, 387 N. E. 2d 320.

No. 78–1934. AVARELLO *v.* UNITED STATES;
No. 78–6924. BOWERS *v.* UNITED STATES; and
No. 79–18. AVERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1339.

No. 78–1935. JOHN O. BUTLER CO. *v.* LAFF. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 64 Ill. App. 3d 603, 381 N. E. 2d 423.

No. 78–1938. HAUSER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–1939. COLOGNINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–1941. INENDINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 78–1942. BROWN, COMMISSIONER OF PUBLIC SAFETY OF THE CITY OF ATLANTA *v.* MINTER. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 397, 254 S. E. 2d 326.

No. 78–1944. STEWART *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 251, 401 A. 2d 1026.

No. 78–1946. WILKES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 78–1947. ABRAMOVICH *v.* BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT No. 1 OF THE TOWN OF BROOKHAVEN ET AL., SUFFOLK COUNTY, NEW YORK, AKA THREE VILLAGE CENTRAL SCHOOL DISTRICT No. 1. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 450, 386 N. E. 2d 1077.

No. 78–1948. BORRE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 598 F. 2d 612.

No. 78–1949. PARDON-GONZALEZ ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1091.

No. 78–6333. WING *v.* WHITE, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 78–6378. CHRISTIAN *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 35 Ore. App. 339, 581 P. 2d 132.

No. 78–6388. CLEMENT *v.* KANSAS. Ct. App. Kan. Certiorari denied. Reported below: 2 Kan. App. 2d xxiii, 588 P. 2d 492.

No. 78–6406. BECK *v.* HANBERRY, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 901.

No. 78–6424. PONTING *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 22 Cal. 3d 946, 587 P. 2d 1144.

No. 78–6454. FOX *v.* HOPPER, WARDEN. Super. Ct. Ga., Tattnall County. Certiorari denied.

No. 78–6457. MARLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6458. LINAM *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. Reported below: 93 N. M. 307, 600 P. 2d 253.

No. 78–6478. DODARO *v.* UNITED STATES;
No. 78–6487. LYNCH *v.* UNITED STATES;
No. 78–6509. BERTOLOTTI *v.* UNITED STATES;
No. 78–6511. DODARO *v.* UNITED STATES; and
No. 78–6512. MALATESTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 1379.

No. 78–6479. MIMS *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 368 So. 2d 1371.

No. 78–6481. BACA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6492. TYNER *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1225.

No. 78–6493. WASHINGTON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 329, 253 S. E. 2d 719.

No. 78–6514. QUICK *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 4th Cir. Certiorari denied. Reported below: 580 F. 2d 1049.

No. 78–6531. WALKER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–6537. LAWRENCE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 365 So. 2d 1356.

No. 78–6546. NORRIS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 130.

No. 78–6550. HAYES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 589 F. 2d 811.

No. 78–6554. MCMAHON *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 49.

No. 78–6565. SMITH *v.* LEEKE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1351.

No. 78–6569. HOLDER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 593 F. 2d 182.

No. 78–6572. LAWRENCE ET AL. *v.* FLORIDA; and BARFIELD *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 357 So. 2d 424 (first case); 360 So. 2d 1251 (second case).

No. 78–6582. BRADLEY *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 1100.

No. 78–6587. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–6592. BRUNEAU *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 1190.

No. 78–6593. PRIEST *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 2d 1383.

No. 78–6597. NEVITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6598. NICHOLAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 78–6601. NELSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 593 F. 2d 543.

No. 78–6605. TOWNES *v.* UNITED STATES C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6611. LERMA *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 1297.

No. 78–6612. SCOTT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6614. OATLEY *v.* CITY OF ATHENS. Ct. App. Ohio, Athens County. Certiorari denied.

No. 78–6615. HENSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 399 A. 2d 16.

No. 78–6620. CARDILLO *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1211.

No. 78–6624. WEEMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 860.

No. 78–6626. KYLES *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 490, 255 S. E. 2d 10.

No. 78–6627. HALL, AKA THOMAS *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 46 N. Y. 2d 873, 387 N. E. 2d 610.

No. 78–6629. DOCTOR *v.* DOCTOR. C. A. 9th Cir. Certiorari denied.

No. 78–6633. ERB ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 596 F. 2d 412.

No. 78–6635. SPRUYTTE *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 590 F. 2d 335.

No. 78–6638. MEJIA *v.* RUE SERVICE CORP. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 78–6639. COLLINS *v.* ALEXANDER, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1341.

No. 78–6641. OLGUIN *v.* ROMERO, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 78–6644. CANCILLA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 859.

No. 78–6647. WITTEBORT *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 78–6651. WEST *v.* NEW YORK ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–6652. EBENHART *v.* HELLER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 609.

No. 78–6653. SISBARRO *v.* WARDEN, MASSACHUSETTS STATE PENITENTIARY. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 2d 1.

No. 78–6654. OWENS *v.* MISSOURI. Ct. App. Mo., St. Louis Dist. Certiorari denied. Reported below: 574 S. W. 2d 436.

No. 78–6655. WALDEN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 590 F. 2d 85.

No. 78–6656. DARROW *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 767.

No. 78–6660. CAMERON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 78–6661. MCCLENDON *v.* BRIGGS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1224.

No. 78–6662. CLOUDY *v.* NEIER ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 212.

No. 78–6663. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 78–6664. SARLI *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1225.

No. 78–6665. PAYNE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of Los Angeles. Certiorari denied.

No. 78–6668. KUDAROSKI *v.* MAZZOLA ET AL. C. A. 1st Cir. Certiorari denied.

No. 78–6669. ANDREWS *v.* OKLAHOMA ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6670. PERKINS ET UX. *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 585 F. 2d 518.

No. 78–6671. BEGLEY *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 830.

No. 78–6676. BRYANT *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 78–6677. FIGUEROA *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6678. BLAKENEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6679. STEVENSON *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 215.

No. 78–6681. KIRBY *v.* HANBERRY, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 239.

No. 78–6683. STODDARD *v.* WEAVER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 588 F. 2d 831.

No. 78–6684. BALDWIN *v.* NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1347.

No. 78–6685. TAYLOR *v.* DEPARTMENT FOR HUMAN RESOURCES OF KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 78–6688. ROWLETT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6689. GEHRING *v.* CRIST, WARDEN. Sup. Ct. Mont. Certiorari denied.

No. 78–6691. HARRELL *v.* HOPE, CLERK, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA. C. A. 10th Cir. Certiorari denied.

No. 78–6692. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 78–6694. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL. Ct. App. Md. Certiorari denied.

No. 78–6697. COX *v.* RIGGSBY, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 517.

No. 78–6700. HANLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 588 F. 2d 824.

No. 78–6701. VANZANDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–6702. CONNER *v.* AUGER, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 595 F. 2d 407.

No. 78–6703. CROSBY *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 35 Ore. App. 617, 582 P. 2d 40.

No. 78–6706. STUART *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 78–6709. MANTHE *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 38 Ore. App. 90, 588 P. 2d 1131.

No. 78–6710. HERSHBERGER *v.* HERSHBERGER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6711. HUNTOON *v.* DEPARTMENT OF JOB SERVICES OF IOWA ET AL. Sup. Ct. Iowa. Certiorari denied. Reported below: 275 N. W. 2d 445.

No. 78–6712. FRANCIOTTI *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6714. PALMER *v.* YOUNGSTOWN CIVIL SERVICE COMMISSION. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 78–6716. MILLS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 367 So. 2d 547.

No. 78–6717. DARABAN *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6718. KROPIWKA *v.* DEPARTMENT OF INDUSTRY, LABOR AND HUMAN RELATIONS OF WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 87 Wis. 2d 709, 275 N. W. 2d 881.

No. 78–6719. DUNN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 594 F. 2d 1367.

No. 78–6721. COOPER *v.* CAMPBELL, CORRECTION SUPERINTENDENT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 628.

No. 78–6722. REYNOLDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6723. ROSENBERG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–6727. BOWERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 593 F. 2d 376.

No. 78–6728. ROBBINS ET VIR *v.* DISTRICT COURT OF WORTH COUNTY, IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 592 F. 2d 1015.

No. 78–6729. YOUNG *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 596 F. 2d 339.

No. 78–6731. BECKNELL v. TEXAS BUS LINES. C. A. 5th Cir. Certiorari denied.

No. 78–6732. PARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 594.

No. 78–6735. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 78–6736. HICKEY *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 596 F. 2d 1082.

No. 78–6737. COLE *v.* RADFORD ET AL. Sup. Ct. Va. Certiorari denied.

No. 78–6738. ROSS *v.* REED, SECRETARY, DEPARTMENT OF CORRECTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 616.

No. 78–6741. LAWRENCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1149.

No. 78–6742. NORRIS *v.* MINTZ ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6744. GREEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1227.

No. 78–6749. KLEASEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 78–6751. BARNES *v.* JONES, CORRECTIONAL SUPERINTENDENT ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–6752. ELMORE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 78–6753. GONZALES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 577 S. W. 2d 226.

No. 78–6754. HOOD *v.* UNITED STATES; and
No. 78–6774. THURMOND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 78–6755. GIBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 125.

No. 78–6756. GEORGE *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied.

No. 78–6757. GRIFFIN ET AL. *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. Reported below: 578 S. W. 2d 654.

No. 78–6758. RICH *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 395 A. 2d 1123.

No. 78–6759. HILL *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 864.

No. 78–6761. DINCER *v.* 1901 WYOMING AVENUE COOPERATIVE ASSN. Ct. App. D. C. Certiorari denied.

No. 78–6762. ROGERS *v.* LING ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–6763. PETERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6764. COLLIER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 588 F. 2d 1352.

No. 78–6766. RANDLE *v.* PLANK ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 596.

No. 78–6767. BARNES *v.* UNITED STATES PAROLE COMMISSION. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 854.

No. 78–6769. TYSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6770. CARLTON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6775. BOYCE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1246.

No. 78–6776. PAPADAKIS *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 78–6778. WASHINGTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1230.

No. 78–6779. CHAFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1220.

No. 78–6781. MENDENHALL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 639.

No. 78–6782. BRYAN *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 856.

No. 78–6783. DECKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 733.

No. 78–6785. SILO *v.* WARDEN, HOLMESBURG PRISON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6786. JORDAN *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 78–6787. PETITO *v.* HARRIS, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–6789. INMAN *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 270 Ind. —, 383 N. E. 2d 820.

No. 78–6790. HERNANDEZ ET AL. *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1341.

No. 78–6791. WALLACE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 641.

No. 78–6792. THACKER *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 859.

No. 78–6793. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 859.

No. 78–6794. LEE *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6796. FIELDS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 78–6797. BLANKENSHIP *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 270.

No. 78–6800. KELLY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 78–6803. GRIFFIN *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 78–6804. LUCAS *v.* KOCH MARKETING CO. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 361 So. 2d 194.

No. 78–6806. FERRARA ET AL. *v.* HENDRY COUNTY SCHOOL BOARD. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 362 So. 2d 371.

No. 78–6807. TURNER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 1207.

No. 78–6808. LINDSEY *v.* DAYTON HUDSON CORP., DBA TARGET STORES. C. A. 10th Cir. Certiorari denied. Reported below: 592 F. 2d 1118.

No. 78–6810. JOHNSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 785, 391 N. E. 2d 1006.

No. 78–6811. WATKINS *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 40 N. C. App. 17, 251 S. E. 2d 877.

No. 78–6812. HENDERSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6814. HORNE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1055.

No. 78–6815. WILLBORN *v.* UNITED STATES PAROLE COMMISSION. C. A. 10th Cir. Certiorari denied.

No. 78–6816. MORROW *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 857.

No. 78–6817. HALE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 78–6818. FREYRE *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 362 So. 2d 989.

No. 78–6819. SHADD *v.* TRIDICO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1214.

No. 78–6820. LAPHAM *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied.

No. 78–6822. PAUL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 78–6824. CAREY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 281.

No. 78–6825. SAULSBURY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1028.

No. 78–6826. BOAG *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 78–6827. STUTZMAN *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 284 Md. 260, 396 A. 2d 243.

No. 78–6828. CALICUTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 598 F. 2d 1120.

No. 78–6829. TRACY *v.* CITY OF DANVILLE, VIRGINIA. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 582.

No. 78–6830. BELCHER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 742.

No. 78–6832. STRADER *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 595 F. 2d 1217.

No. 78–6833. GABRIEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 597 F. 2d 95.

No. 78–6835. CHESSA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 78–6836. RICO *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 593 F. 2d 431.

No. 78–6837. KLUSKA *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 484 Pa. 508, 399 A. 2d 681.

No. 78–6838. BRYANT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1220.

No. 78–6841. REDDING *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 78–6842. POOLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1220.

No. 78–6843. MARQUEZ-MARQUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 78–6844. INMON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 352.

No. 78–6845. OGROD *v.* OGROD. Super. Ct. Pa. Certiorari denied. Reported below: 263 Pa. Super. 594, 400 A. 2d 622.

No. 78–6846. NEVELS *v.* PARRATT, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 596 F. 2d 344.

No. 78–6847. WHITESIDE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 585 S. W. 2d 415.

No. 78–6848. PITTS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 372 So. 2d 470.

No. 78–6849. HATCH *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 78–6850. BOWINE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 67 App. Div. 2d 1110, 413 N. Y. S. 2d 796.

No. 78–6851. POWELL *v.* GRADDICK, ATTORNEY GENERAL OF ALABAMA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6852. WOODSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6854. MESSINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 78–6855. RUNGE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 593 F. 2d 66.

No. 78–6857. BRONCHEAU *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1260.

No. 78–6858. KUNTZ *v.* UNITED STATES. Ct. Cl. Certiorari denied.

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No. 78–6859. CROWE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 78–6861. FREDERICK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 583 F. 2d 273.

No. 78–6862. POWERS *v.* CICCONE, MEDICAL CENTER DIRECTOR. C. A. 8th Cir. Certiorari denied.

No. 78–6864. CYPHERS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6865. GLOVER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 857.

No. 78–6866. ARGUELLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 109.

No. 78–6868. BETHEA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 331.

No. 78–6869. TILLI *v.* PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1336.

No. 78–6870. STEVENS *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 78–6871. WHEELER *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1215.

No. 78–6873. ASHER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE, ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 78–6877. KOON *v.* VETERANS' ADMINISTRATION ET AL.; and

No. 78–6886. ALLEN *v.* VETERANS' ADMINISTRATION ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1334.

No. 78–6874. TUCHSCHMIDT *v.* KALISH. Sup. Ct. Mo. Certiorari denied.

No. 78–6878. MOODY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 78–6880. JACKSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 78–6881. PRASAD *v.* MERGES, DIRECTOR OF DEVELOPMENTAL CENTER, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 663, 409 N. Y. S. 2d 815.

No. 78–6882. DIXON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 593 F. 2d 626.

No. 78–6883. NAZARIO-CASTULO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 78–6888. SWEENEY *v.* STRYJAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6889. TAYLOR *v.* SCISM, CHAIRMAN, PAROLE COMMISSION OF NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 591 F. 2d 1340.

No. 78–6890. MASSEY *v.* CUMMINGS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 78–6892. NOEL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 78–6893. DAVIDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 597 F. 2d 230.

No. 78–6894. GIBSON *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 235, 411 N. Y. S. 2d 71.

No. 78–6895. HULSEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 125.

No. 78–6898. ELMS *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1211.

No. 78–6902. YOUNG *v.* ATTORNEY GENERAL OF NEW MEXICO. C. A. 10th Cir. Certiorari denied.

No. 78–6907. MCRAE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 593 F. 2d 700.

No. 78–6908. LINGER *v.* WEISS, JUDGE, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 57 Ohio St. 2d 97, 386 N. E. 2d 1354.

No. 78–6909. JACKSON *v.* DUCKWORTH, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 833.

No. 78–6910. HARRIS ET VIR *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 78–6913. SPERMAN ET VIR *v.* CODD, POLICE COMMISSIONER OF NEW YORK CITY. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 215.

No. 78–6914. BERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 267.

No. 78–6915. LOCKETT *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 857.

No. 78–6916. BRADY ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 359.

No. 78–6917. GARDNER *v.* CONTROL NETWORKS CORP. ET AL. App. Ct. Ill., 1st Dist. Certiorari denied.

No. 78–6918. HEGWOOD *v.* LANDRY ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6919. TORRES, AKA LOPEZ *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 1113, 387 N. E. 2d 1300.

No. 78–6920. MATTHEWS *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 78–6921. FERRELL *v.* YOUNG, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 857.

No. 78–6925. HUNDLEY *v.* FERENCE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1212.

No. 78–6927. GILES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1049.

No. 78–6929. BROWN *v.* MEROLA ET AL. C. A. 2d Cir. Certiorari denied.

No. 78–6930. EASTON *v.* MISSOURI. Ct. App. Mo., Springfield Dist. Certiorari denied. Reported below: 577 S. W. 2d 953.

No. 78–6931. PITCHFORD *v.* SUPREME COURT OF ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. 752, 581 S. W. 2d 321.

No. 78–6934. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 186.

No. 78–6935. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 770.

No. 78–6937. BELL *v.* CHURCH ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6939. KASSIMA *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 79–3. HOUSEN *v.* DUKE. Sup. Ct. Wyo. Certiorari denied. Reported below: 589 P. 2d 334.

No. 79–6. MILLER *v.* NEW YORK. County Ct. of Broome County, N. Y. Certiorari denied.

No. 79–7. MORRIS ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 2d 851.

No. 79–9. PLUMAS COUNTY BOARD OF SUPERVISORS ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 756.

No. 79–12. REDDECK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1345.

No. 79–15. CALIFORNIA TAHOE REGIONAL PLANNING AGENCY ET AL. *v.* JENNINGS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 181.

No. 79–17. RUBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 278.

No. 79–20. FLAT GLASS ASSOCIATION OF JAPAN ET AL. *v.* CONSUMER PRODUCT SAFETY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 169, 593 F. 2d 1323.

No. 79–21. ALONZO ET AL. *v.* VILLAGE OF ROMEOVILLE. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–22. AIR FREIGHT HAULAGE CO., INC. *v.* RYD-AIR, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 211.

No. 79–23. WORLEY *v.* WHALEY ET AL. Ct. App. Mo., St. Louis Dist. Certiorari denied.

No. 79–25. SNYDER *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–26. WALKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 1345.

No. 79–27. FRIEND *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 865.

No. 79–28. BECKLEAN ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 598 F. 2d 1122.

No. 79–29. PEABODY COAL CO. *v.* MISSOURI PUBLIC SERVICE CO. Ct. App. Mo., Kansas City Dist. Certiorari denied. Reported below: 583 S. W. 2d 721.

No. 79–32. HORSLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 1265.

No. 79–33. GOERES ET AL. *v.* JAPAN AIR LINES, LTD., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 242.

No. 79–35. HACKETT ET AL. *v.* HACKETT. Ct. App. N. C. Certiorari denied. Reported below: 39 N. C. App. 501, 253 S. E. 2d 366.

No. 79–36. ROBINSON *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 202 Neb. 210, 274 N. W. 2d 553.

No. 79–37. COVERT MARINE, INC., ET AL. *v.* OUTBOARD MARINE CORP. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–40. HOKE *v.* BOARD OF MEDICAL EXAMINERS OF NORTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 595 F. 2d 1217.

No. 79–41. VALENZUELA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 1361.

No. 79–42. PAVILONIS *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 571.

No. 79–43. BOBULSKI *v.* OHIO. Ct. App. Ohio, Franklin County. Certiorari denied.

No. 79–50. SATCO, INC. *v.* TRANSEQUIP, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1318.

No. 79–51. DiLapi et al. *v.* Irving, General Counsel, National Labor Relations Board. C. A. 2d Cir. Certiorari denied. Reported below: 600 F. 2d 1027.

No. 79–52. Naifeh *v.* United States; and
No. 79–53. Abraham *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 79–56. Nara *v.* Michigan State Board of Dentistry. Sup. Ct. Mich. Certiorari denied.

No. 79–58. Gillen *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 541.

No. 79–59. Illinois *v.* United States et al. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–60. Hayes *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 258.

No. 79–61. Town of Mashpee et al. *v.* Mashpee Tribe; and
No. 79–62. Mashpee Tribe *v.* New Seabury Corp. et al. C. A. 1st Cir. Certiorari denied. Reported below: 592 F. 2d 575.

No. 79–65. Gard *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1230.

No. 79–70. Dragos *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 576.

No. 79–71. Boutureira et al. *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 67 App. Div. 2d 20, 414 N. Y. S. 2d 159.

No. 79–72. Brown *v.* United States. C. A. 2d Cir. Certiorari denied.

No. 79–74. Stevers *v.* Ohio. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–76. BLACK *v.* PAYNE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 83.

No. 79–77. OREGON *v.* MCGREW. Ct. App. Ore. Certiorari denied. Reported below: 38 Ore. App. 493, 590 P. 2d 755.

No. 79–78. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1223.

No. 79–83. FINCKH, BY JACKSON, GUARDIAN AD LITEM *v.* FINCKH ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 602.

No. 79–84. GARRETT *v.* OHIO. Ct. App. Ohio, Lucas County. Certiorari denied.

No. 79–87. CONTRACTORS & BUILDERS ASSOCIATION OF PINELLAS COUNTY ET AL. *v.* CITY OF DUNEDIN, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 358 So. 2d 846.

No. 79–89. NOLAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–91. ALEXANDER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 600.

No. 79–92. LINCOLN PARK NURSING HOME ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 626, 618 F. 2d 121.

No. 79–95. DEGREGORIO *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–96. WEATHERFORD *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 369 So. 2d 863.

No. 79–99. TREDWAY *v.* DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied. Reported below: 403 A. 2d 732.

No. 79–106. TALLY *v.* JOHNSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 79–108. CAMERON *v.* GREENHILL ET AL. Ct. Civ. App. Tex., 3d Sup. Jud. Dist. Certiorari denied. Reported below: 577 S. W. 2d 389.

No. 79–109. UNNAMED PHYSICIAN *v.* MARYLAND COMMISSION ON MEDICAL DISCIPLINE. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 1, 400 A. 2d 396.

No. 79–112. COUNTRYMAN *v.* TEXAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 588 F. 2d 1355.

No. 79–113. RAMOS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 216.

No. 79–114. ROGERS ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–115. POLISHING MACHINE SYSTEMS, INC., ET AL. *v.* COFFIN. C. A. 4th Cir. Certiorari denied. Reported below: 596 F. 2d 1202.

No. 79–117. VITALE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 688.

No. 79–120. CARPENTER ET AL. *v.* EDWARDS & WARREN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 388.

No. 79–122. RATCLIFF *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 474.

No. 79–123. RIVERA *v.* CRUZ ET AL. Sup. Ct. P. R. Certiorari denied. Reported below: —— P. R. R. ——.

No. 79–124. SHEERAN ET AL. *v.* GENERAL ELECTRIC CO. C. A. 9th Cir. Certiorari denied. Reported below: 593 F. 2d 93.

No. 79–125. MCCUTCHEON *v.* CHICAGO BOARD OF EDUCATION ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–127. HARRIS ET AL., T/A LEON L. MOORE OIL CO. *v.* ATLANTIC RICHFIELD CO. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 857.

No. 79–135. NATIONAL BROADCASTING CO., INC. *v.* BURKE. C. A. 1st Cir. Certiorari denied. Reported below: 598 F. 2d 688.

No. 79–141. WAY BAKING CO. *v.* INTERSTATE BRANDS CORP. Sup. Ct. Mich. Certiorari denied. Reported below: 403 Mich. 479, 270 N. W. 2d 103.

No. 79–144. MERTENS *v.* MORRIS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 601.

No. 79–150. PRAETORIUS *v.* UNITED STATES; and
No. 79–156. PRAETORIUS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–151. NEW YORK *v.* ST. AGATHA HOME FOR CHILDREN, INC., ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 46, 389 N. E. 2d 1098.

No. 79–152. HOME INDEMNITY CO. *v.* STILLWELL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 597 F. 2d 87.

No. 79–159. DELLIGATTE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–160. CONNELLY *v.* COMMERCIAL TRADING CO., INC. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 961, 411 N. Y. S. 2d 95.

No. 79–165. TINAWY *v.* TRAVELERS AID SOCIETY OF NEW YORK, INC., ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 682, 409 N. Y. S. 2d 472.

No. 79–163. HOPMANN *v.* SOUTHERN PACIFIC TRANSPORTATION CO. Ct. Civ. App. Tex., 12th Sup. Jud. Dist. Certiorari denied. Reported below: 581 S. W. 2d 532.

No. 79–176. OSWALD ET AL. *v.* GENERAL MOTORS CORP.; and

No. 79–179. GENERAL MOTORS CORP. *v.* OSWALD ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 1106.

No. 79–178. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 588 F. 2d 872.

No. 79–187. MARCY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–193. LIVINGSTON ET UX. *v.* EWING, DIRECTOR, MUSEUM OF NEW MEXICO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 601 F. 2d 1110.

No. 79–199. DEJARDIN *v.* UNION TRUST COMPANY OF MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 590 F. 2d 330.

No. 79–235. MOLEVER ET AL. *v.* PREISER ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–238. MUTUAL OF OMAHA INSURANCE CO. *v.* AYLESWORTH. C. A. 6th Cir. Certiorari denied. Reported below: 598 F. 2d 1040.

No. 79–250. FRANKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 954.

No. 79–254. BRUNWASSER *v.* OFFICE OF DISCIPLINARY COUNSEL. Sup. Ct. Pa. Certiorari denied.

No. 79–263. GALBREATH *v.* NEWSPAPER PRINTING CORP. ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 580 S. W. 2d 777.

No. 79–264. WATKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 201.

No. 79–267. GIRARD ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 69.

No. 79–275. BOOTH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–285. GITCHO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 369.

No. 79–316. DUNCAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 839.

No. 79–319. ROUNDTREE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 672.

No. 79–5001. FAMBROUGH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 79–5005. ALLEN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 227.

No. 79–5006. STANLEY *v.* HAWAII. Sup. Ct. Hawaii. Certiorari denied. Reported below: 60 Haw. 527, 592 P. 2d 422.

No. 79–5008. SALAS *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 218, 593 F. 2d 1372.

No. 79–5011. BUTLER ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79–5012. KINNELL *v.* MARQUEZ, CORRECTIONS SECRETARY, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–5014. RANDALL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 79–5015. PANTHASRI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–5017. CARRERAS *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 588 F. 2d 818.

No. 79–5018. UDELL *v.* STATE DEPARTMENT OF MASSACHUSETTS ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5019. POTEMRA *v.* PING ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5021. DYER *v.* HESS, WARDEN, ET AL. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5024. WINSTEAD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 583.

No. 79–5025. EDMONDSON *v.* HESS ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–5027. CALVIN K. ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 211.

No. 79–5028. SAYLES *v.* SHUKER, JUDGE, ET AL. Ct. App. D. C. Certiorari denied.

No. 79–5029. YOUNG, AKA CLOUDY *v.* OWENS, REFORMATORY SUPERINTENDENT. C. A. 7th Cir. Certiorari denied.

No. 79–5030. SANDERS ET AL. *v.* HANKINS ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 79–5033. RANDALL *v.* EISENHOWER MEDICAL CENTER. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–5034. SPIEZIO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 227.

No. 79–5037. CHAMBERLIN *v.* CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–5042. LEFEBRE *v.* ISRAEL, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 79–5043. BRANHAM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1229.

No. 79–5045. CARTER *v.* DEGRAZIA ET AL. C. A. 1st Cir. Certiorari denied.

No. 79–5046. MACGREGOR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1225.

No. 79–5052. GILBERT *v.* YALANZON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 239.

No. 79–5054. LEWIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–5057. DICKERSON *v.* SMALL BUSINESS ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 595 F. 2d 1211.

No. 79–5058. MAGGIACOMO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5060. HARRISON *v.* UNITED STATES C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–5062. CRAVEN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–5063. AGOSTO *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 573.

No. 79–5064. HOLMES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 594 F. 2d 1167.

No. 79–5069. TWIGG *v.* OHIO. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5070. WILSON *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 385 N. E. 2d 438.

No. 79–5071. GREENING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5073. CARTER *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1341.

No. 79–5074. FLETCHER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5076. FLYNN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 576.

No. 79–5081. CARDEN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1320.

No. 79–5082. GASTON *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1223.

No. 79–5084. CROUCH *v.* UNITED PRESS INTERNATIONAL ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 212.

No. 79–5086. GLOVER *v.* GENERAL MOTORS ACCEPTANCE CORP., INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5088. FAIRCLOTH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 297 N. C. 100, 253 S. E. 2d 890.

No. 79–5089. KARASIK *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied.

No. 79–5093. DRIGGERS *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–5096. LOE *v.* CLEMENTS, SHERIFF, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–5097. POLK *v.* HARRIS. C. A. 2d Cir. Certiorari denied.

No. 79–5102. PRENZLER *v.* UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA (PIKE ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 79–5106. GRAYSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1225.

No. 79–5107. MCDONALD *v.* BIRCH, JUDGE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79–5111. MIRENDA *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–5113. ANTHONY *v.* BOORSTIN, LIBRARIAN OF CONGRESS. C. A. D. C. Cir. Certiorari denied.

No. 79–5116. GREEN *v.* HUNTER, U. S. DISTRICT JUDGE, ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5118. MITCHELL *v.* MITCHELL, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 858.

No. 79–5122. MCDONALD *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE; AND MCDONALD *v.* YELLOW FREIGHT SYSTEMS, INC. C. A. 6th Cir. Certiorari denied.

No. 79–5124. SANKEY *v.* BUTLER, SHERIFF. C. A. 5th Cir. Certiorari denied.

No. 79–5126. ANDREWS *v.* SOUTH CAROLINA ET AL. Sup. Ct. S. C. Certiorari denied.

No. 79–5128. LYONS *v.* SULLIVAN ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 602 F. 2d 7.

No. 79–5130. MAGUIRE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 600 F. 2d 330.

No. 79–5131. MONTGOMERY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1342.

No. 79–5132. REMIRO *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. Reported below: 89 Cal. App. 3d 809, 153 Cal. Rptr. 89.

No. 79–5134. DEVONE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 401 A. 2d 971.

No. 79–5135. WATTS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5136. GIVENS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 448.

No. 79–5138. ALIM, AKA MCQUEEN *v.* METZ, CORRECTIONAL SUPERINDENT. C. A. 2d Cir. Certiorari denied.

No. 79–5140. PETERS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 148 Ga. App. 850, 253 S. E. 2d 214.

No. 79–5141. LOMONACO *v.* HARRIS, CORRECTIONAL SUPERINTENDANT. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 68 App. Div. 2d 1019, 414 N. Y. S. 2d 74.

No. 79–5142. JACKSON *v.* BEATRICE FOOD CO., DBA MEADOW GOLD DAIRIES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1219.

No. 79–5144. COFFEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–5148. MEREDITH *v.* MACDOUGALL, CORRECTIONS DIRECTOR, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 79–5149. STUDIFIN *v.* NEW YORK TELEPHONE CO. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 610.

No. 79–5151. WOOD *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5153. SHAW *v.* GARRISON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 582.

No. 79–5154. OLIPHANT *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 594 F. 2d 547.

No. 79–5155. BLOEMHOF *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–5156. SAMPSON *v.* BREWER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 593 F. 2d 798.

No. 79–5158. COY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–5160. STOUT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 866.

No. 79–5161. SCOTT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5164. MAXWELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 588 F. 2d 568.

No. 79–5166. WILKINS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5171. DODARO *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–5186. EVANS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 582.

No. 79–5190. THERIAULT ET AL. *v.* ESTABLISHMENT OF RELIGION ON TAXPAYERS' MONEY IN THE FEDERAL BUREAU OF PRISONS ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–5192. ROBERTS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5195. SCHERZER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–5203. BURNETTE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 219.

No. 79–5207. DABDOUB-DIAZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 96.

No. 79–5213. POTTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–5220. JORDAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 171.

No. 79–5221. ROBINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 2d 760.

No. 79–5224. SIMMONS *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 79–5235. VINCENZO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5242. BROOKS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: See 600 F. 2d 563.

No. 79–5249. HESTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 78–986. ARKANSAS LOUISIANA GAS CO. *v.* HALL ET AL. Ct. App. La., 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 359 So. 2d 255.

No. 79–5266. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 972.

No. 78–1585. LOUISIANA *v.* FEDERAL ENERGY REGULATORY COMMISSION; and

No. 78–1681. TEXAS *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of these petitions. Reported below: 587 F. 2d 716.

No. 78–1662. CHEVRON U. S. A., INC., ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 588 F. 2d 1383.

No. 78–1724. CITRONELLE-MOBILE GATHERING, INC. *v.* GULF OIL CORP. ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 578 F. 2d 1149.

No. 78–1878. SEBRING UTILITIES COMMISSION ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 591 F. 2d 1003.

No. 78–1464. ILLINOIS *v.* GENERAL PAVING CO. ET AL. C. A. 7th Cir. Motion of Cumberland Farms Dairy, Inc., et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 590 F. 2d 680.

No. 78–1562. CITRONELLE-MOBILE GATHERING, INC. *v.* GULF OIL CORP. ET AL. Temp. Emerg. Ct. App. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 591 F. 2d 711.

No. 78–1665. JERSEY CENTRAL POWER & LIGHT CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 589 F. 2d 142.

No. 78–1738. SCHLESINGER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 598 F. 2d 722.

No. 78–6693. DIXON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari.

No. 78–6696. STILLING *v.* OREGON. Sup. Ct. Ore. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 285 Ore. 293, 590 P. 2d 1225.

No. 78–6784. RYAN *v.* WHITE ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 598 F. 2d 616.

No. 78–1676. KENTUCKY *v.* SIMPSON. Ct. App. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 585 S. W. 2d 444.

No. 78–1691. STARREN *v.* STARREN. Ct. App. Cal., 4th App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied.

No. 78–1752. NEW YORK *v.* WHARTON. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 46 N. Y. 2d 924, 388 N. E. 2d 341.

No. 78–1786. HUECKER ET AL. *v.* WEISENBERGER ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 593 F. 2d 49.

No. 78–1819. MASSACHUSETTS *v.* SOARES ET AL. Sup. Jud. Ct. Mass. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 377 Mass. 461, 387 N. E. 2d 499.

No. 79–2. WARDEN, ILLINOIS STATE PENITENTIARY, ET AL. *v.* HAIRSTON. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 597 F. 2d 604.

No. 79–46. ESTELLE, CORRECTIONS DIRECTOR *v.* FITCH. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 587 F. 2d 773.

No. 79–94. CASTELLANO ET AL. *v.* SPEARS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 601 F. 2d. 598.

No. 78–1661. CECIL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, dissenting.

After his arrest for the sale of cocaine to undercover agents, petitioner was indicted for possession of cocaine with intent to distribute, in violation of 21 U. S. C. § 841 (a)(1) and 18 U. S. C. § 2. He was acquitted following a nonjury trial in the United States District Court for the District of Colorado on a finding by the trial judge that the evidence did not show either actual or constructive possession. No. 78–CR–211 (Sept. 1, 1978). Two weeks later, petitioner was indicted for possession of cocaine with intent to distribute and for distribution of cocaine arising out of the same episode. The Government concedes that this reindictment was designed to correct the prosecutor's error in drawing the original indictment too narrowly to fit the actual offense. Petitioner moved

to dismiss the prosecution under the Double Jeopardy Clause and the motion was denied. On interlocutory appeal, see *Abney* v. *United States*, 431 U. S. 651 (1977), the Tenth Circuit affirmed in part and reversed in part, holding that the charge of possession was barred by the prior acquittal but that the charge of distribution involved a different offense from possession and therefore was not barred. App. to Pet. for Cert. 6–12. Rehearing and rehearing en banc were denied April 3, 1979.

I would grant the petition for certiorari and reverse the judgment of the Tenth Circuit so far as it permits petitioner to be tried on the distribution charge. I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment requires the prosecution in one proceeding, except in extremely limited circumstances not present here, of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

No. 78–1715. COLLUM *v.* LOUISIANA; and IN RE COLLUM. Sup. Ct. La. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 368 So. 2d 460.

No. 78–1743. VAUGHN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 599 F. 2d 1058.

No. 78–6802. WILSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: See 583 F. 2d 540.

No. 78–1733. STANTON ET AL. *v.* MACKEY ET AL. C. A. 7th Cir. Motion of respondent Catherine Mackey for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 586 F. 2d 1126.

No. 78–1720. WORLDWIDE CHURCH OF GOD, INC., ET AL. *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Sup. Ct. Cal. Motion of American Civil Liberties Union of Southern California et al. for leave to file a brief as *amici curiae* granted. Certiorari denied.

No. 78–1739. PETTUS *v.* AMERICAN AIRLINES, INC., ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 587 F. 2d 627.

No. 78–6760. MARTIN *v.* SOUTH DAKOTA. Sup. Ct. S. D. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 274 N. W. 2d 893.

No. 78–6867. PATE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 585 S. W. 2d 415.

No. 78–1791. FIRST NATIONAL BANK OF COMMERCE *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (SKOURAS, TRUSTEE, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari.

No. 78–6772. BOGARD *v.* COOK, PENITENTIARY SUPERINTENDENT, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 586 F. 2d 399.

No. 78–1801. FLORIDA *v.* MULLINS. Sup. Ct. Fla. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 366 So. 2d 1162.

No. 78–1804. BARTANEN *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 121 Ariz. 454, 591 P. 2d 546.

No. 78–6523. SHORT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 368 So. 2d 1078.

No. 78–1852. CHROMALLOY AMERICAN CORP., FEDERAL MALLEABLE DIVISION *v.* MARSHALL, SECRETARY OF LABOR. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE POWELL would grant certiorari. Reported below: 589 F. 2d 1335.

No. 78–1856. DORL *v.* FOSTER WHEELER CORP. C. A. 3d Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 595 F. 2d 1211.

No. 79–57. CANADIAN ACE BREWING CO. *v.* ANHEUSER-BUSCH, INC. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 601 F. 2d 593.

No. 79–79. PIHER INTERNATIONAL CORP. ET AL. *v.* CTS CORP. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 593 F. 2d 777.

No. 78–1931. UNITED STATES GYPSUM CO. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 600 F. 2d 414.

No. 78–6567. LEDUC *v.* FLORIDA. Sup. Ct. Fla.;
No. 78–6577. JORDAN *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 78–6637. HENRY *v.* FLORIDA. Sup. Ct. Fla.;
No. 78–6650. VILLARREAL *v.* TEXAS. Ct. Crim. App. Tex.;
No. 78–6695. PRESNELL *v.* GEORGIA. Sup. Ct. Ga.;
No. 78–6740. SMITH *v.* FLORIDA. Sup. Ct. Fla.;
No. 78–6897. FLEMING *v.* GEORGIA. Sup. Ct. Ga.;
No. 79–5059. JACKSON *v.* FLORIDA. Sup. Ct. Fla.;
No. 79–5075. SALVATORE *v.* FLORIDA. Sup. Ct. Fla.;
No. 79–5115. SPENCER *v.* HOPPER, WARDEN. Sup. Ct. Ga.;
No. 79–5143. WILLIS *v.* GEORGIA. Sup. Ct. Ga.; and
No. 79–5169. FOSTER *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: No. 78–6567, 365 So. 2d 149; No. 78–6577, 365 So. 2d 1198; No. 78–6637, see 328 So. 2d 430; No. 78–6650, 576 S. W. 2d 51; No. 78–6695, 243 Ga. 131, 252 S. E. 2d 625; No. 78–6740, 365 So. 2d 704; No. 78–6897, 243 Ga. 120, 252 S. E. 2d 609; No. 79–5059, 366 So. 2d 752; No. 79–5075, 366 So. 2d 745; No. 79–5115, 243 Ga. 532, 255 S. E. 2d 1; No. 79–5143, 243 Ga. 185, 253 S. E. 2d 70; No. 79–5169, 369 So. 2d 928.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 78–6745. AWKARD ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 597 F. 2d 667.

No. 79–174. JOHNSON ET AL. *v.* MOTOR VEHICLE DIVISION, DEPARTMENT OF REVENUE OF COLORADO. Sup. Ct. Colo. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 197 Colo. 455, 593 P. 2d 1363.

No. 78–6872. MOONEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 243 Ga. 373, 254 S. E. 2d 337.

No. 79–5091. PAPP *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL would grant certiorari.

No. 78–6900. HERBERT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 598 F. 2d 344.

No. 79–5003. DIGERONIMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 598 F. 2d 746.

No. 78–6906. SPEIGHT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction. Reported below: 148 Ga. App. 87, 251 S. E. 2d 36.

No. 79–10. UNIVERSITY OF TENNESSEE ET AL. *v.* GEIER ET AL. C. A. 6th Cir. Motion of University of Tennessee at Nashville Chapter of American Association of University Professors for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion and petition. Reported below: 597 F. 2d 1056.

No. 79–55. TENNESSEE HIGHER EDUCATION COMMISSION *v.* GEIER ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this petition. Reported below: 597 F. 2d 1078.

No. 79–5016. COBB *v.* SOUTHERN RAILWAY CO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 598 F. 2d 618.

No. 79–145. CALIFORNIA *v.* MINJARES. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST would grant certiorari. Reported below: 24 Cal. 3d 410, 591 P. 2d 514.

No. 79–194. GIGANTE *v.* LANKLER, DEPUTY ATTORNEY GENERAL OF NEW YORK. Ct. App. N. Y. Motions of Roman Catholic Archdiocese of New York and Central Rabbinical Congress of the United States and Canada for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 47 N. Y. 2d 160, 390 N. E. 2d 1151.

No. 79–5223. MASON ET UX. *v.* KOROLOGOS ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition. Reported below: 601 F. 2d 581.

Rehearing Denied

No. 77–1032. CITY OF COLUMBUS ET AL. *v.* LEONARD ET AL., 443 U. S. 905;

No. 78–329. BELLOTTI, ATTORNEY GENERAL OF MASSACHUSETTS, ET AL. *v.* BAIRD ET AL., 443 U. S. 622;

No. 78–334. FARE, ACTING CHIEF PROBATION OFFICER *v.* MICHAEL C., 442 U. S. 707;

No. 78–610. COLUMBUS BOARD OF EDUCATION ET AL. *v.* PENICK ET AL., 443 U. S. 449;

No. 78–627. DAYTON BOARD OF EDUCATION ET AL. *v.* BRINKMAN ET AL., 443 U. S. 526;

No. 78–749. KENTUCKY *v.* WHORTON, 441 U S. 786;

No. 78–1084. KENTUCKY *v.* WILLIAMS, 442 U. S. 914;

No. 78–1085. KENTUCKY *v.* AVERY, 442 U. S. 914;

No. 78–1303. CHISNELL *v.* CHISNELL, 442 U. S. 940; and

No. 78–1379. TAHOE NUGGET, INC., DBA JIM KELLEY'S TAHOE NUGGET, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 442 U. S. 921. Petitions for rehearing denied.

No. 78–1409. WILLIAMS *v.* PORT AUTHORITY OF NEW YORK AND NEW JERSEY ET AL., 441 U. S. 945;

No. 78–1430. PRETERM, INC., ET AL. *v.* KING, GOVERNOR OF MASSACHUSETTS, ET AL., 441 U. S. 952;

No. 78–1465. SAHARA-TAHOE CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL., 442 U. S. 917;

No. 78–1467. MIDTAUNE *v.* UNITED STATES, 442 U. S. 917;

No. 78–1470. LOPEZ *v.* UNITED STATES, 442 U. S. 947;

No. 78–1482. MEYERS *v.* CHILCOTE, 442 U. S. 925;

No. 78–1508. RUDDER ET AL. *v.* WISE COUNTY HOUSING AND REDEVELOPMENT AUTHORITY, 441 U. S. 939;

No. 78–1527. LUNA *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 442 U. S. 935;

No. 78–1529. HUNT ET AL. *v.* COMMODITY FUTURES TRADING COMMISSION, 442 U. S. 921;

No. 78–1541. HOWELL *v.* GATES ET AL., 442 U. S. 930;

No. 78–1543. SPERLING *v.* UNITED STATES, 441 U. S. 947;

No. 78–1554. BELL *v.* NEW JERSEY ET AL., 442 U. S. 918;

No. 78–1626. ROSENBAUM *v.* ROSENBAUM, 442 U. S. 935;

No. 78–1750. TUSSEL *v.* UNITED STATES, 442 U. S. 943;

No. 78–1922. AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS ET AL. *v.* KAHN, CHAIRMAN, COUNCIL ON WAGE AND PRICE STABILITY, ET AL., 443 U. S. 915;

No. 78–6223. VON BYRD *v.* TEXAS, 441 U. S. 967;

No. 78–6282. WHITEHEAD *v.* UNITED STATES, 442 U. S. 911;

No. 78–6308. RECTOR *v.* UNITED STATES, 441 U. S. 963;

No. 78–6330. VELEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 441 U. S. 963;

No. 78–6375. FERGUSON *v.* TEXAS, 442 U. S. 934;

No. 78–6409. BELLO *v.* TEXAS, 442 U. S. 935; and

No. 78–6420. FRIEDMAN *v.* AVON PRODUCTS, 442 U. S. 911. Petitions for rehearing denied.

No. 78–6428. MINER *v.* CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, 442 U. S. 931;

No. 78–6444. SMITH *v.* KANSAS, 441 U. S. 964;

No. 78–6461. PLEASANT *v.* CALIFORNIA, 441 U. S. 964;

No. 78–6516. DARBY ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION No. 1547, ET AL., 442 U. S. 944;

No. 78–6542. WELCH *v.* FALKE, MONTGOMERY COUNTY PROSECUTING ATTORNEY, 442 U. S. 920;

No. 78–6549. GULLY ET AL. *v.* KUNZMAN, JUDGE, ET AL., 442 U. S. 924;

No. 78–6553. LUPERT *v.* COLLEGE OF LAW OF SYRACUSE UNIVERSITY, 442 U. S. 925;

No. 78–6557. DINKE *v.* RIGGS NATIONAL BANK OF WASHINGTON, D. C., 442 U. S. 912;

No. 78–6561. YOUNG *v.* ZANT, WARDEN, 442 U. S. 934;

No. 78–6604. RAITPORT *v.* CLERK OF THE SUPREME COURT OF THE UNITED STATES, 442 U. S. 927;

No. 78–6613. PEERY *v.* UNITED STATES, 442 U. S. 913; and

No. 78–6715. KRIZ *v.* UNITED STATES, 442 U. S. 945. Petitions for rehearing denied.

No. 78–432. UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC *v.* WEBER ET AL.;

No. 78–435. KAISER ALUMINUM & CHEMICAL CORP. *v.* WEBER ET AL.; and

No. 78–436. UNITED STATES ET AL. *v.* WEBER ET AL., 443 U. S. 193. Motion to dispense with printing petition granted. Petition for rehearing denied. MR. JUSTICE POWELL and MR. JUSTICE STEVENS took no part in the consideration or decision of the motion and petition.

No. 78–479. EDMONDS *v.* COMPAGNIE GENERALE TRANSATLANTIQUE, 443 U. S. 256. Motion to defer consideration and petition for rehearing denied. MR. JUSTICE POWELL took no

part in the consideration or decision of this motion and petition.

No. 78–575. SOUTHERN RAILWAY CO. *v.* SEABOARD ALLIED MILLING CORP. ET AL., 442 U. S. 444;

No. 78–597. INTERSTATE COMMERCE COMMISSION *v.* SEABOARD ALLIED MILLING CORP. ET AL., 442 U. S. 444;

No. 78–604. SEABOARD COAST LINE RAILROAD CO. ET AL. *v.* SEABOARD ALLIED MILLING CORP. ET AL., 442 U. S. 444;

No. 78–685. ABERDEEN & ROCKFISH RAILROAD CO. ET AL. *v.* UNITED STATES ET AL., 442 U. S. 946; and

No. 78–5283. JACKSON *v.* VIRGINIA ET AL., 443 U. S. 307. Petitions for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of these petitions.

No. 78–765. MICHIGAN *v.* CONNER, 441 U. S. 943;

No. 78–1316. FLEX-A-LITE CORP. *v.* SCHWITZER DIVISION, WALLACE-MURRAY CORP., 441 U. S. 952;

No. 78–6237. PHILLIPS *v.* LOUISIANA, 442 U. S. 919;

No. 78–6350. SREMANIAK *v.* UNITED STATES, 441 U. S. 963; and

No. 78–6544. RODES *v.* PRISTO ET AL., 441 U. S. 951. Motions for leave to file petitions for rehearing denied.

No. 78–1610. UNITED AIR LINES, INC. *v.* MCDONALD, 442 U. S. 934. Petition for rehearing denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition.

OCTOBER 5, 1979

Miscellaneous Order

No. A–290. O'HAIR ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. D. C. D. C. Application for injunction, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

OCTOBER 9, 1979

Appeals Dismissed

No. 78–6773. THOMAS *v.* NEW YORK. Appeal from App. Term, Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

At issue in this appeal is whether admission into evidence of one's refusal to submit to a blood test to determine inebriation is contrary to the Fifth Amendment's prohibition of compelled testimonial incrimination. In the instant case the New York Court of Appeals, in finding the refusal to be admissible into evidence, upheld in the face of constitutional challenge the state statute authorizing admission. Other state courts have reached identical conclusions. *E. g., Commonwealth* v. *Robinson*, 229 Pa. Super. 131, 324 A. 2d 441 (1974); *State* v. *Meints*, 189 Neb. 264, 202 N. W. 2d 202 (1972). But the courts of some States have decided that the Fifth and Fourteenth Amendments require that the evidence be held inadmissible. *E. g., Dudley* v. *State*, 548 S. W. 2d 706 (Tex. Crim. App. 1977); *State* v. *Andrews*, 297 Minn. 260, 212 N. W. 2d 863 (1973), cert. denied, 419 U. S. 881 (1974).

Because of this conflict among state courts as to the reach of the Fifth Amendment's protection against compelled testimonial evidence, I dissent from the Court's decision to dismiss this appeal.

No. 79–251. SAPPINGTON *v.* BECKERT, JUDGE, ET AL. Appeal from D. C. E. D. Pa. dismissed for want of jurisdiction.

No. 79–5103. CAREY *v.* NEW YORK STATE HUMAN RIGHTS APPEAL BOARD ET AL. Appeal from Ct. App. N. Y. dismissed for want of substantial federal question. Reported below: 46 N. Y. 2d 1063, 390 N. E. 2d 301.

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No. 79–329. SKINKISS *v.* OWENS-CORNING FIBERGLAS CORP. Appeal from Ct. App. Ohio, Lucas County, dismissed for want of substantial federal question.

No. 79–5189. COLVER *v.* CALIFORNIA. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question.

No. 79–5101. PETRILLO *v.* TOWNSHIP OF WOODBRIDGE. Appeal from Super. Ct. N. J. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–5174. RAITPORT *v.* PROVIDENT NATIONAL BANK. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 485 Pa. 201, 401 A. 2d 364.

No. 79–5217. CORRADO *v.* GIFFORD. Appeal from Sup. Ct. R. I. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: —— R. I. ——, 401 A. 2d 53.

No. 79–5198. POWELL *v.* ESTELLE, CORRECTIONS DIRECTOR. Appeal from Sup. Ct. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: See 580 S. W. 2d 169.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Certiorari Granted—Vacated and Remanded. (See also No. 78–6932, *ante*, p. 1.)

No. 79–274. MOYE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Reported below: 177 Conn. 487, 418 A. 2d 870.

Miscellaneous Orders

No. A–219. PROVENZANO *v.* UNITED STATES. C. A. 3d Cir. Application for bail pending appeal, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–231. HUDSON *v.* PARKS & WILDLIFE DEPARTMENT OF TEXAS ET AL. C. A. 5th Cir. Application for an injunction pending appeal, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–242 (79–300). INSPIRATION ENTERPRISES, INC., ET AL. *v.* INLAND CREDIT CORP. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–277. NATIONAL RAILROAD PASSENGER CORP. *v.* HALL, MEMBER OF CONGRESS, ET AL. C. A. D. C. Cir. Motion to vacate stay granted by THE CHIEF JUSTICE on September 30, 1979, denied.

No. D–162. IN RE DISBARMENT OF TURNER. Disbarment entered. [For earlier order herein, see 441 U. S. 919.]

No. D–164. IN RE DISBARMENT OF MACURDY. Disbarment entered. [For earlier order herein, see 441 U. S. 920.]

No. D–165. IN RE DISBARMENT OF ROTHBART. Disbarment entered. [For earlier order herein, see 441 U. S. 920.]

No. D–167. In re Disbarment of Reiser. Disbarment entered. [For earlier order herein, see 441 U. S. 920.]

No. D–170. In re Disbarment of Cohen. It is ordered that Robert Baer Cohen, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–171. In re Disbarment of Garcia. It is ordered that James Leon Garcia, Jr., of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–172. In re Disbarment of Bendes. It is ordered that Maurice Albert Bendes, of Lawrence, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–173. In re Disbarment of Salls. It is ordered that Eugenio Cornier Salls, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–174. In re Disbarment of Spooner. It is ordered that Daniel J. Spooner, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–175. In re Disbarment of Feldshuh. It is ordered that Sidney Feldshuh, of Scarsdale, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–176. In re Disbarment of Pravda. It is ordered that David A. Pravda, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 82, Orig. New Mexico *v.* Texas. Motions of Arkansas and Committee on Power for the Southwest, Inc., et al. for leave to intervene denied. Motion for leave to file a bill of complaint denied. [For earlier order herein, see 442 U. S. 908.]

No. 78–1183. Carbon Fuel Co. *v.* United Mine Workers of America et al. C. A. 4th Cir. [Certiorari granted, 440 U. S. 957.] Motion of American Federation of Labor & Congress of Industrial Organizations for leave to file a brief as *amicus curiae* granted.

No. 78–1202. Chiarella *v.* United States. C. A. 2d Cir. [Certiorari granted, 441 U. S. 942.] Motion of Securities Industry Association for leave to file a brief as *amicus curiae* granted.

No. 78–1323. Norfolk & Western Railway Co. *v.* Liepelt, Administratrix. App. Ct. Ill., 1st Dist. [Certiorari granted, 441 U. S. 904.] Motions of National Association of Railroad Trial Counsel, Association of Trial Lawyers of America, and State Trial Lawyers Association for leave to file briefs as *amici curiae*, granted.

No. 78–1335. VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL. C. A. 7th Cir. [Certiorari granted, 441 U. S. 922.] Motions for leave to file briefs as *amici curiae* filed by the following were granted: Coalition of National Voluntary Organizations et al., Los Angeles Council of National Voluntary Health Agencies, National Council of Churches of Christ in the U. S. A. et al., Holy Spirit Association for the Unification of World Christianity, National Committee for Responsive Philanthropy et al., and American Federation of Labor & Congress of Industrial Organizations.

No. 78–1513. UNITED STATES *v.* CLARK, GUARDIAN. Ct. Cl. [Probable jurisdiction postponed, 441 U. S. 960.] Motion of Barbara Jenkins for leave to file a brief as *amicus curiae* granted.

No. 78–1902. INTERNATIONAL LONGSHOREMEN'S ASSN., AFL–CIO *v.* CONSOLIDATED EXPRESS, INC., ET AL.;

No. 78–1905. NEW YORK SHIPPING ASSN., INC., ET AL. *v.* CONSOLIDATED EXPRESS, INC., ET AL.;

No. 79–221. CONSOLIDATED EXPRESS, INC., ET AL. *v.* NEW YORK SHIPPING ASSN., INC., ET AL. C. A. 3d Cir.; and

No. 79–73. ADELAIDE SHIPPING LINES, LTD., ET AL. *v.* SUNKIST GROWERS, INC. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–5204. RAITPORT *v.* PROVIDENT NATIONAL BANK. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Postponed

No. 79–243. RICHMOND NEWSPAPERS, INC., ET AL. *v.* VIRGINIA ET AL. Appeal from Sup. Ct. Va. Further consideration of question of jurisdiction postponed to hearing of case on the merits.

Certiorari Granted

No. 78–1933. MONTGOMERY, DBA LAMINATING COMPANY OF COLORADO ET AL. *v.* CENTURY LAMINATING, LTD. C. A. 10th Cir. Certiorari granted. Reported below: 595 F. 2d 563.

No. 79–192. NEW YORK GASLIGHT CLUB, INC., ET AL. *v.* CAREY. C. A. 2d Cir. Certiorari granted. Reported below: 598 F. 2d 1253.

No. 78–6621. BECK *v.* ALABAMA. Sup. Ct. Ala. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the question presented by the Court: May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict? Reported below: 365 So. 2d 1006.

No. 78–6899. GODFREY *v.* GEORGIA. Sup. Ct. Ga. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the question presented by the Court: In affirming the imposition of the death sentence in this case, has the Georgia Supreme Court adopted such a broad and vague construction of Georgia Code Ann. § 27–2534.1 (b)(7) (specifying certain aggravating circumstances) as to violate the Eighth and Fourteenth Amendments to the United States Constitution? Reported below: 243 Ga. 302, 253 S. E. 2d 710.

No. 79–5010. BIFULCO *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 600 F. 2d 407.

Certiorari Denied. (See also Nos. 79–5101, 79–5174, 79–5217, and 79–5198, *supra.*)

No. 78–1504. CRUZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 594 F. 2d 268.

No. 78–1909. CARCHMAN ET UX. *v.* KORMAN CORP. C. A. 3d Cir. Certiorari denied. Reported below: 594 F. 2d 354.

No. 78–6788. DIX *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 86 Wis. 2d 474, 273 N. W. 2d 250.

No. 78–6923. BELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–11. BOONE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 416, 254 S. E. 2d 367.

No. 79–19. PAULEY PETROLEUM, INC., ET AL. *v.* UNITED STATES ET AL. Ct. Cl. Certiorari denied. Reported below: 219 Ct. Cl. 24, 591 F. 2d 1308.

No. 79–24. GUZMAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 79–44. PACIFIC INTERNATIONAL RICE MILLS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1323.

No. 79–47. EMERY *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79–63. COLUMBIA GAS TRANSMISSION CORP. *v.* SOUTHGATE DEVELOPMENT CORP. Ct. App. Ohio, Lorain County. Certiorari denied.

No. 79–85. DAVIDSON SUPPLY CO. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 613.

No. 79–98. JACK'S COOKIE CO. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 597 F. 2d 395.

No. 79–102. SAJDAK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–103. DORSY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1189.

No. 79–129. MILLETTE & ASSOCIATES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 121.

No. 79–175. CITY OF ST. LOUIS *v.* THOMAS W. GARLAND, INC., ET AL.; and

No. 79–206. MANLEY INVESTMENT CO. *v.* THOMAS W. GARLAND, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 596 F. 2d 784.

No. 79–195. WHEELER ET AL. *v.* ROMAN CATHOLIC ARCHDIOCESE OF BOSTON, INC., ET AL. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 378 Mass. 58, 389 N. E. 2d 966.

No. 79–202. BOWDEN ET AL. *v.* MCKENNA ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 600 F. 2d 282.

No. 79–204. EASLEY *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 90 Cal. App. 3d 440, 153 Cal. Rptr. 396.

No. 79–210. ANDREWS *v.* CAHILL, FAMILY COURT COMMISSIONER FOR WAUKESHA COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 597.

No. 79–211. ALEXANDER, DBA STRAND THEATER, K.I.M.Y. B.A. CORP., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 8th Cir. Certiorari denied. Reported below: 595 F. 2d 454.

No. 79–213. HOWELL *v.* METRO BANK OF DALLAS ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1188.

No. 79–214. CHINARIAN *v.* RUCKS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–219. LAMB ET AL. *v.* BROWN. Sup. Ct. Ohio. Certiorari denied.

No. 79–225. SALAS ET AL. *v.* CORTEZ ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 3d 22, 593 P. 2d 226.

No. 79–227. SCHULMAN ET AL. *v.* PATERSON REDEVELOPMENT AGENCY. Sup. Ct. N. J. Certiorari denied. Reported below: 78 N. J. 378, 396 A. 2d 573.

No. 79–242. FRANKLIN LIFE INSURANCE CO. *v.* COMMONWEALTH EDISON CO. C. A. 7th Cir. Certiorari denied. Reported below: 598 F. 2d 1109.

No. 79–259. AMF, INC. *v.* GENERAL MOTORS CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 68.

No. 79–273. POTTER ET AL., DBA POTTER & POTTER *v.* JONES ET AL. Sup. Ct. Ark. Certiorari denied.

No. 79–308. PROTECTION MARITIME INSURANCE CO., LTD., ET AL. *v.* PINO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 599 F. 2d 10.

No. 79–5079. CLOUDY *v.* BOESCH ET AL. Sup. Ct. Ind. Certiorari denied.

No. 79–5092. MCDONALD *v.* UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 79–5105. WEAVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 79–5123. HARGROVE *v.* CITY OF GARLAND, TEXAS. Ct. Civ. App. Tex., 5th Sup. Jud. Dist. Certiorari denied. Reported below: 581 S. W. 2d 699.

No. 79–5127. SHORT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 1122.

No. 79–5133. CRAWFORD *v.* CRAWFORD. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–5173. RAUF, AKA JACKSON *v.* CITY OF ATLANTA BUREAU OF POLICE SERVICES ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5185. GARCIA *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 391 N. E. 2d 604.

No. 79–5193. PRINCE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 579 S. W. 2d 941.

No. 79–5194. PAGE *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–5201. AUDI *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 535, 389 N. E. 2d 534.

No. 79–5206. HARRIS *v.* SACHS, ATTORNEY GENERAL OF MARYLAND, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 580.

No. 79–5208. GIBSON *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–5211. MCDERMOTT *v.* NATIONS ET AL. Sup. Ct. Mo. Certiorari denied. Reported below: 580 S. W. 2d 249.

No. 79–5212. SLOCUM *v.* JERNIGAN, CORRECTIONAL SUPERINTENDENT. C. A. 5th Cir. Certiorari denied.

No. 79–5222. MYERS *v.* BULL. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 863.

No. 79–5226. GREER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 468.

No. 79–5229. JAMISON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5278. LUGO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 1055.

No. 79–5280. MALACHESEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 597 F. 2d 1232.

No. 79–5281. WARE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79–5282. MCGROARTY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5287. DAY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: See 533 F. 2d 524.

No. 79–5288. TANGRADI, AKA HOFFMAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5290. STUCKEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1053.

No. 79–5292. SMITH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 834.

No. 79–5295. BLUE THUNDER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 550.

No. 79–5309. MOREL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 79–5313. PAUL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 560.

No. 79–5317. HAWKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 368.

No. 79–5322. REILLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5326. ALDERETE-SALAZAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–5327. TOLLIVER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79–5328. MOSBY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 585.

No. 79–5339. JIMENEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1172.

No. 78–1702. SOCIALIST WORKERS PARTY ET AL. *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 596 F. 2d 58.

MR. JUSTICE WHITE, dissenting.

In 1973, petitioners instituted a civil action against the United States and various federal officials. Petitioners alleged that for over 40 years the Federal Bureau of Investigation had conducted a systematic, covert campaign to disrupt the lawful activities of petitioner organizations. Pretrial discovery revealed that more than 1,300 unidentified informers had provided the FBI with information concerning petitioners. Petitioners sought production of FBI files concerning the informers, and the FBI resisted with a claim of informer privilege. After conducting an *in camera* review of FBI files concerning 19 representative informers, the District Court ordered the FBI to produce 18 of the files for inspection by petitioners' attorneys.

The United States sought review of the discovery order by means of appeal and mandamus pursuant to 28 U. S. C. §§ 1291 and 1651. Review was denied by the Court of Appeals for the Second Circuit, which held that the discovery

order was not appealable and that mandamus was inappropriate. *In re United States*, 565 F. 2d 19 (1977). A petition by the United States for certiorari was denied, with three Justices dissenting. *Bell* v. *Socialist Workers Party*, 436 U. S. 962 (1978) (BURGER, C. J., and WHITE and POWELL, JJ., dissenting).

The Attorney General then refused to comply with the discovery order, and the District Court adjudged him in civil contempt. The Attorney General appealed the contempt order and sought mandamus in the Court of Appeals. The Court of Appeals dismissed the appeal, holding that a civil contempt order is not appealable under 28 U. S. C. § 1291. The court nevertheless granted a writ of mandamus, vacated the contempt order, and directed the District Court to consider alternative sanctions against the Attorney General. *In re Attorney General of United States*, 596 F. 2d 58 (1979).

I would grant the petition for certiorari in this case because the decision of the Court of Appeals that mandamus was appropriate is arguably contrary to the prior decisions of this Court. *Will* v. *Calvert Fire Ins. Co.*, 437 U. S. 655 (1978); *Kerr* v. *United States District Court*, 426 U. S. 394 (1976). I also believe that this case raises a substantial question concerning the appealability of a civil judgment for disobedience of a discovery order that is not itself appealable. Cf. *United States* v. *Ryan*, 402 U. S. 530, 532 (1971).

No. 78–1749. BLAKLEY *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 362 So. 2d 309.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

I dissent from the denial of certiorari. In *Doyle* v. *Ohio*, 426 U. S. 610, 619 (1976), the Court held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment."

The petitioner in this case was tried and convicted for the crime of sexual battery involving the use of great force. On direct examination in the State's case in chief a police officer testified that petitioner refused to make a statement after he was arrested and given *Miranda* warnings. Defense objections to this testimony were overruled by the trial court. On appeal, petitioner's conviction was affirmed by a divided Florida District Court of Appeal. 362 So. 2d 309 (1978).

I would grant certiorari in this case because the decision of the Florida District Court of Appeal is in conflict with *Doyle* v. *Ohio, supra.* Indeed, the conflict with *Doyle* seems sufficiently clear to me to warrant summary reversal of petitioner's conviction.

No. 78–1836. LEWIN *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied. Reported below: 163 N. J. Super. 439, 395 A. 2d 211.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

I dissent from the denial of certiorari. The question in this case is whether the requirements of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), apply to police interrogations of persons arrested for motor vehicle violations.

At the scene of an automobile accident, petitioner was arrested for operating a motor vehicle while under the influence of liquor. Petitioner was taken to police headquarters where he was questioned at length before being given *Miranda* warnings. Petitioner subsequently was charged with the crime of causing death by heedless and careless operation of an automobile. At trial the prosecution introduced into evidence statements made by petitioner before he was given *Miranda* warnings. Petitioner was convicted and sentenced to a 1-year term in county jail.

The Appellate Division of the Superior Court of New Jersey affirmed petitioner's conviction. Citing *State* v. *Macuk*, 57 N. J. 1, 268 A. 2d 1 (1970), the court held that "[t]he law in

New Jersey is plain that *Miranda* warnings need not be given to a person arrested for or charged with a violation of the motor vehicle laws such as drunken driving, before investigatory questioning of him." 163 N. J. Super. 439, 441, 395 A. 2d 211, 212 (1978).

Following the New Jersey rule, a number of other courts have held that *Miranda* warnings need not be given to persons arrested for traffic offenses or other misdemeanors. See, *e. g.*, *Clay* v. *Riddle*, 541 F. 2d 456 (CA4 1976); *State* v. *Neal*, 476 S. W. 2d 547 (Mo. 1972); *State* v. *Gabrielson*, 192 N. W. 2d 792 (Iowa 1971); *State* v. *Pyle*, 19 Ohio St. 2d 64, 249 N. E. 2d 826 (1969), cert. denied, 396 U. S. 1007 (1970). Other courts have held to the contrary, relying on the language in *Miranda*, which was reaffirmed in *Orozco* v. *Texas*, 394 U. S. 324, 327 (1969), "that the warnings were required when the person being interrogated was 'in custody at the station *or otherwise deprived of his freedom of action in any significant way.*' 384 U. S., at 477." (Emphasis in original.) See, *e. g.*, *State* v. *Lawson*, 285 N. C. 320, 204 S. E. 2d 843 (1974); *State* v. *Darnell*, 8 Wash. App. 627, 508 P. 2d 613, cert. denied, 414 U. S. 1112 (1973); *Campbell* v. *Superior Court*, 106 Ariz. 542, 479 P. 2d 685 (1971).

I would grant the petition for certiorari to resolve this conflict.

No. 78–1917. TRAFELET ET AL., JUDGES *v.* THOMPSON, GOVERNOR OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 594 F. 2d 623.

MR. JUSTICE WHITE, dissenting.

This case presents the issue whether a state law that requires elected judges to retire at the age of 70, challenged on grounds that it violates the First and Fourteenth Amendments, ought to be subjected to strict scrutiny or to the less exacting rational-relationship test employed by the court below. The determination turns on whether the challenged judicial retirement law is properly regarded as a limitation

on access to the ballot that impairs "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams* v. *Rhodes*, 393 U. S. 23, 30 (1968). We have held as recently as last Term that a state law limiting access to the ballot "impairs the voters' ability to express their political preferences," and thus could be justified only by a compelling state interest whose presence or absence is determined when a reviewing court subjects the questioned provision to strict scrutiny. *Illinois Elections Bd.* v. *Socialist Workers Party*, 440 U. S. 173, 184 (1979). Accord, *e. g.*, *Storer* v. *Brown*, 415 U. S. 724, 728–729 (1974).

Because the decision of the court below as to the appropriate standard of review is possibly in conflict with these and other decisions of this Court, I would grant this petition for certiorari and dissent from the Court's unwillingness to do so.

No. 78–1943. THOMPSON *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari, vacate judgment, and remand case for further consideration in light of *Brown* v. *Texas*, 443 U. S. 47 (1979). Reported below: 296 N. C. 703, 252 S. E. 2d 776.

No. 78–6596. HANSON *v.* CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT OF ILLINOIS. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 591 F. 2d 404.

MR. JUSTICE WHITE, dissenting.

I dissent from the denial of certiorari and would vote to grant the petition to resolve the conflict in the decided cases. It is apparent that some federal courts would have entertained petitioner's 42 U. S. C. § 1983 action, see *Strader* v. *Troy*, 571 F. 2d 1263 (CA4 1978); *Shipp* v. *Todd*, 568 F. 2d 133 (CA9

1978) (*per curiam*); *Pueschel* v. *Leuba*, 383 F. Supp. 576 (Conn. 1974), while another, like the court below, would not. *Cavett* v. *Ellis*, 578 F. 2d 567 (CA5 1978).

No. 78–6603. LARSEN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 348, 385 N. E. 2d 679.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

In *United States* v. *Wade*, 388 U. S. 218 (1967), this Court held that a postindictment lineup is a critical prosecutive stage in which an accused is entitled to have counsel present under the Sixth Amendment. In reliance on *Wade* the highest court of the State of New York has held that a pretrial psychiatric examination is also a critical stage in which the accused has a right to have defense counsel present. *Lee* v. *County Court*, 27 N. Y. 2d 432, 267 N. E. 2d 452, cert. denied, 404 U. S. 823 (1971). Accord, *State* v. *Corbin*, 15 Ore. App. 536, 516 P. 2d 1314 (1973); *State* v. *Anderson*, 8 Wash. App. 782, 509 P. 2d 80 (1973).

In the instant case, however, the Supreme Court of Illinois has refused to extend *Wade*'s Sixth Amendment analysis to pretrial psychiatric examinations and thus has aligned itself with every Federal Court of Appeals that has decided the issue, *e. g.*, *United States* v. *Trapnell*, 495 F. 2d 22 (CA2 1974); *United States* v. *Greene*, 497 F. 2d 1068 (CA7 1974), cert. denied, 420 U. S. 909 (1975), and with many other state courts, *e. g.*, *People* v. *Martin*, 386 Mich. 407, 192 N. W. 2d 215 (1971), cert. denied, 408 U. S. 929 (1972); *State* v. *Wilson*, 26 Ohio App. 2d 23, 268 N. E. 2d 814 (1971).

In view of the conflict among highest state courts over whether a pretrial psychiatric examination constitutes a critical prosecutive stage in which the accused is entitled to have counsel present under the Sixth Amendment, I would grant this petition and accordingly dissent from the Court's refusal to do so.

No. 78-6649. MILHOLLAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 518.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE POWELL join, dissenting.

The Court today denies certiorari in a case which is, in my view, plainly inconsistent with our recent decision in *Arkansas* v. *Sanders*, 442 U. S. 753 (1979). The facts may be summarized briefly. On September 22, 1977, the petitioner cashed two money orders at a bank in Girard, Pa., after producing identification in the name of John J. Leehy, Jr., the designated payee. On the following day, the petitioner attempted to cash two additional money orders also made out to John J. Leehy, Jr., at a bank in Warren, Pa. Bank officials became suspicious and alerted the police, who asked petitioner for identification. Petitioner responded that he had identification in his car and then began to flee. He was apprehended and taken to the police station, where he was searched. The search uncovered, among other things, a car key on a tag marked "Gold Capri."

After a short time, an officer located a gold-colored Capri in a municipal parking lot about 100 yards from the place of arrest. Noticing a police scanner and a book of police car numbers in the car, the officer opened the car door with the petitioner's key, and drove the vehicle to the police station. There he conducted a warrantless search of the car. Inside he found various items, including a closed satchel. He opened the satchel and discovered 22 money orders, all payable to John J. Leehy, Jr.

Petitioner was convicted on a two-count indictment for transporting stolen money orders in interstate commerce in violation of 18 U. S. C. § 2314. Although only the Girard transaction was alleged in the indictment, the money orders inside the satchel and other evidence seized during the search of the car were admitted at trial over petitioner's objection.

A divided Court of Appeals upheld the warrantless searches

of both the car and the satchel. 599 F. 2d 518 (CA3 1979). According to the majority, the search of the car was lawful because it was supported by probable cause and exigent circumstances were present. The majority found the search of the satchel distinguishable from that in *United States* v. *Chadwick*, 433 U. S. 1 (1977), where we held that the Fourth Amendment was violated by a warrantless search of a footlocker that had been transported on a train and later loaded into the trunk of an automobile. According to the Court of Appeals, *Chadwick* did not affect what it regarded as the rule for "pure" car searches: "police entitled to search an automobile . . . could also search [containers] carried in that automobile." 599 F. 2d, at 526.

Even assuming the court's ruling on the search of the car does not warrant review, I believe that the search of the satchel cannot stand. In *Arkansas* v. *Sanders*, *supra*, this Court expressly rejected the reading of *Chadwick* offered by the court below. Speaking three months after the decision of the Court of Appeals in the present case, we observed that a container such as petitioner's "is not necessarily attended by any lesser expectation of privacy . . . merely because [it] is to be carried in an automobile rather than transported by other means." 442 U. S., at 764. We therefore held there was no special rule permitting police to search a container whenever the container is found in an automobile. *Id.*, at 766. "[T]he extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile." *Id.*, at 764–765, n. 13. That holding, of course, represents a square repudiation of the reasoning of the Court of Appeals in this case.

I would grant certiorari, vacate the judgment below, and remand for reconsideration in light of *Arkansas* v. *Sanders*.*

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*The United States suggests that the case may be distinguishable from *Arkansas* v. *Sanders* because the satchel was searched as part of a police inventory after the car's impoundment, and that in any event admission

No. 79–190. GENERAL ATOMIC CO. *v.* UNITED NUCLEAR CORP. ET AL. Sup. Ct. N. M. Certiorari denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this petition. Reported below: 93 N. M. 105, 597 P. 2d 290.

No. 79–337. ILLINOIS *v.* TROLIA. App. Ct. Ill., 1st Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 69 Ill. App. 3d 439, 388 N. E. 2d 35.

Rehearing Denied

No. 78–6475. HAUGHEY *v.* NEW YORK STATE BOARD OF LAW EXAMINERS, 441 U. S. 964. Petition for rehearing denied.

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Dismissal Under Rule 60

No. 79–287. CHICAGO SHERATON CORP. *v.* ZABAN ET AL. C. A. 7th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 593 F. 2d 808.

Affirmed on Appeal

No. 79–349. MALONE, COMMISSIONER OF LABOR AND INDUSTRY OF MINNESOTA *v.* WHITE MOTOR CORP. ET AL. Affirmed on appeal from C. A. 8th Cir. *Allied Structural Steel Co.* v. *Spannaus*, 438 U. S. 234 (1978). MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 599 F. 2d 283.

Appeal Dismissed

No. 79–5244. DAWSON *v.* DAWSON. Appeal from Ct. App. D. C. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

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of the satchel's contents was harmless. Neither of these claims was passed on by the Court of Appeals, and I would have that court consider them on remand.

Certiorari Granted—Reversed. (See No. 78–1602, *ante*, p. 4.)

Miscellaneous Orders

No. A–90. TAYLOR *v.* UNITED STATES. C. A. 9th Cir. Application for bail, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–123. SHELTON *v.* UNITED STATES. C. A. 9th Cir. Application for bail, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–177. IN RE DISBARMENT OF PANEK. It is ordered that Paul E. Panek, of Belton, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–178. IN RE DISBARMENT OF SMITH. It is ordered that Conrad P. Smith, of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–179. IN RE DISBARMENT OF KYLE. It is ordered that Joe Merrill Kyle, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 65, Orig. TEXAS *v.* NEW MEXICO. Report of the Special Master on Obligation of New Mexico to Texas under the Pecos River Compact received and ordered filed. Exceptions, if any, together with supporting briefs to the Report may be filed by the parties within 45 days. Replies, if any, with supporting briefs, to such exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 434 U. S. 809.]

No. 78–756. OHIO *v.* ROBERTS. Sup. Ct. Ohio. [Certiorari granted, 441 U. S. 904.] Motion of Ohio Public Defenders Association for leave to file a brief as *amicus curiae* granted.

No. 78–857. NATIONAL LABOR RELATIONS BOARD *v.* YESHIVA UNIVERSITY; and

No. 78–997. YESHIVA UNIVERSITY FACULTY ASSN. *v.* YESHIVA UNIVERSITY. C. A. 2d Cir. [Certiorari granted, 440 U. S. 906.] Motion of Trustees of Boston University for leave to file a brief as *amicus curiae* denied.

No. 78–959. PERRIN *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 440 U. S. 956.] Motion of petitioner for leave to file a supplemental brief, after argument, granted.

No. 78–1268. MARTINEZ ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. [Probable jurisdiction noted, 441 U. S. 960.] Motion of the County of Alameda, Cal., for leave to file a brief as *amicus curiae* denied.

No. 78–1327. BOEING CO. *v.* VAN GEMERT ET AL. C. A. 2d Cir. [Certiorari granted, 441 U. S. 942.] Motions to designate counsel to argue on behalf of all respondents, or, in the alternative, to permit divided argument denied.

No. 78–1522. ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH. C. A. 10th Cir. [Certiorari granted, 442 U. S. 928.] Motion of Ute Indian Tribe of the Uintah and Ouray Reservation for leave to intervene denied and alternative motion for leave to file a brief as *amicus curiae* granted.

No. 78–1588. VANCE ET AL. *v.* UNIVERSAL AMUSEMENT CO., INC., ET AL. C. A. 5th Cir. [Probable jurisdiction noted, 442 U. S. 928.] Motion of Charles H. Keating, Jr., for leave to file a brief as *amicus curiae* granted.

No. 79–555. DONNELL ET AL. *v.* UNITED STATES ET AL. Appeal from D. C. D. C. Motion of appellants to expedite consideration of the appeal denied.

No. 78–6809. JENKINS *v.* ANDERSON, WARDEN. C. A. 6th Cir. [Certiorari granted, *ante*, p. 824.] Motion for appointment of counsel granted, and it is ordered that Carl Ziemba, Esquire, of Detroit, Mich., be appointed to serve as counsel for petitioner in this case.

No. 79–149. LYONS *v.* URBOM, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and all other relief denied.

Probable Jurisdiction Noted

No. 79–198. SUPREME COURT OF VIRGINIA ET AL. *v.* CONSUMERS UNION OF THE UNITED STATES, INC., ET AL. Appeal from D. C. E. D. Va. Probable jurisdiction noted. MR. JUSTICE POWELL took no part in the consideration or decision of this matter. Reported below: 470 F. Supp. 1055.

Certiorari Granted

No. 79–66. AARON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari granted. Reported below: 605 F. 2d 612.

No. 79–260. ANDRUS, SECRETARY OF THE INTERIOR *v.* IDAHO ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 595 F. 2d 524.

No. 79–67. WALTER *v.* UNITED STATES; and

No. 79–148. SANDERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 592 F. 2d 788 and 597 F. 2d 63.

Certiorari Denied. (See also No. 79–5244, *supra*.)

No. 78–1711. MALLEK *v.* TEXAS. County Crim. Ct., Dallas County, Tex. Certiorari denied.

No. 78–6529. TURNER *v.* MASSEY, CORRECTIONAL SUPERINTENDENT. C. A. 5th Cir. Certiorari denied.

No. 78–6805. STEELMAN *v.* COLORADO ET AL. Sup. Ct. Colo. Certiorari denied.

No. 78–6938. GARCIA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 79–16. CODUTO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 597.

No. 79–39. MARQUETTE ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 80, 595 F. 2d 887.

No. 79–68. PRESTON ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 596 F. 2d 232.

No. 79–100. GRIMES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–131. SEA-LAND SERVICE, INC. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 8, 604 F. 2d 672.

No. 79–133. HANOVER INSURANCE CO., SUCCESSOR TO MASSACHUSETTS BONDING & INSURANCE CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. Reported below: 598 F. 2d 1211.

No. 79–140. FADELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 79–157. ORIGINAL COSMETICS PRODUCTS, INC., ET AL. *v.* STRACHAN, POSTMASTER AT NEW YORK CITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 79–170. RYAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–180. SHEEDY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–191. CLANCEY *v.* UNITED STATES HOUSE OF REPRESENTATIVES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 237.

No. 79–196. CONGER ET AL. *v.* MADISON COUNTY, TENNESSEE, ET AL. Sup. Ct. Tenn. Certiorari denied. Reported below: 581 S. W. 2d 632.

No. 79–205. RADER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–246. MCCABE *v.* BURGESS, STATE'S ATTORNEY FOR CHAMPAIGN COUNTY, ET AL. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 457, 389 N. E. 2d 565.

No. 79–266. SCHLAX *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–271. BRIDGER *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 264 Ark. 789, 575 S. W. 2d 154.

No. 79–276. MITAN *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 118, 387 N. E. 2d 278.

No. 79–277. TUTT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79–279. MAGNUS PETROLEUM CO., INC., ET AL. *v.* SKELLY OIL CO. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 196.

No. 79–280. WESTERN ELECTRIC CO., INC. *v.* STERN, U. S. DISTRICT JUDGE (KYRIAZI, REAL PARTY IN INTEREST). C. A. 3d Cir. Certiorari denied.

No. 79–284. TERRY ET UX. *v.* KLAMATH PRODUCTION CREDIT ASSN. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–293. YONO *v.* COLUMBUS LANDINGS, LTD. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 2d 129.

No. 79–295. POLLARD *v.* METROPOLITAN LIFE INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 598 F. 2d 1284.

No. 79–304. TEICHNER *v.* ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 88, 387 N. E. 2d 265.

No. 79–339. FUCHS SUGAR & SYRUPS, INC., ET AL. *v.* AMSTAR CORP. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 1025.

No. 79–358. SWIHART *v.* OHIO. Ct. App. Ohio, Medina County. Certiorari denied.

No. 79–360. STEVENS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 1075.

No. 79–372. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 558.

No. 79–382. COTTONE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 619.

No. 79–440. BROWN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 600 F. 2d 248.

No. 79–5038. TEDDER *v.* PETERS ET AL. Sup. Ct. Ill. Certiorari denied.

No. 79–5044. COLON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1220.

No. 79–5056. MIZELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 79–5090. McCLAIN *v.* UNITED STATES;
No. 79–5109. SIMPSON *v.* UNITED STATES; and
No. 79–5129. BRADSHAW *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 593 F. 2d 658.

No. 79–5108. WATSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 79–5120. FLEMING *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 1081.

No. 79–5168. McCONNELL *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 595 P. 2d 147.

No. 79–5219. MONTOYA, AKA MARTINEZ *v.* AULT, CORRECTIONS DIRECTOR. C. A. 10th Cir. Certiorari denied.

No. 79–5228. LONDON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–5231. JONES *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 129.

No. 79–5232. MODLIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–5237. HUFFMAN *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 464, 254 S. E. 2d 489.

No. 79–5245. MABERY *v.* GARRISON, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–5251. FILIPAS *v.* WORKMEN'S COMPENSATION, INDUSTRIAL COMMISSION OF OHIO, ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5252. SHERRILL *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5254. TAYLOR *v.* SAN DIEGO COUNTY DEPARTMENT OF PUBLIC WELFARE ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–5258. GASKINS *v.* ASHE, SHERIFF, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 571.

No. 79–5260. FLORES *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–5261. HARRIS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–5262. SMITH *v.* PERINI, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5263. PEELER *v.* ARIZONA. Ct. App. Ariz. Certiorari denied.

No. 79–5264. HOLT *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 79–5273. SINCLAIR *v.* NEW YORK. App. Term, Sup. Ct. N. Y., 9th and 10th Jud. Dists. Certiorari denied.

No. 78–6680. MCCORMICK ET AL. *v.* TEXAS. Ct. Crim. App. Tex.;

No. 78–6777. EARVIN *v.* TEXAS. Ct. Crim. App. Tex.;

No. 78–6799. CORLEY *v.* TEXAS. Ct. Crim. App. Tex.;

No. 79–5031. HARGRAVE *v.* FLORIDA. Sup. Ct. Fla.; and

No. 79–5061. MASON *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 78–6680, 582 S. W. 2d 786;

No. 78–6777, 582 S. W. 2d 794; No. 78–6799, 582 S. W. 2d 815; No. 79–5031, 366 So. 2d 1; No. 79–5061, 219 Va. 1091, 254 S. E. 2d 116.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–86. CRITZER *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 220 Ct. Cl. 43, 597 F. 2d 708.

No. 79–231. PACIFIC TELEPHONE & TELEGRAPH CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL.; and

No. 79–232. GENERAL TELEPHONE COMPANY OF CALIFORNIA *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 600 F. 2d 1309.

No. 79–278. CONNELL, CHAIRMAN, NATIONAL CREDIT UNION ADMINISTRATION BOARD, ET AL. *v.* AMERICAN BANKERS ASSN. ET AL. C. A. D. C. Cir. Motion of San Diego Federal Savings & Loan Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this motion and petition. Reported below: 194 U. S. App. D. C. 80, 595 F. 2d 887.

No. 79–5004. PARKER *v.* ROTH. Sup. Ct. Neb. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 202 Neb. 850, 278 N. W. 2d 106.

October 19, 1979

Miscellaneous Order

Nos. A–172 and A–332. Lenhard et al., Clark County Deputy Public Defenders, individually and as next friends of Bishop *v.* Wolff, Warden, et al. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to Mr. Justice Brennan, and by him referred to the Court, denied. Petition for rehearing of order of Court entered October 1, 1979 [*ante*, p. 807], denied. Mr. Justice Brennan would grant the application for stay and petition for rehearing. Mr. Justice Marshall took no part in the consideration or decision of this application and petition.

October 29, 1979

Appeals Dismissed

No. 79–80. Quattry *v.* Florida. Appeal from Dist. Ct. App. Fla., 4th Dist., dismissed for want of substantial federal question. Reported below: 362 So. 2d 64.

No. 79–359. Lotze et al. *v.* Washington. Appeal from Sup. Ct. Wash. dismissed for want of substantial federal question. Mr. Justice White, Mr. Justice Blackmun, and Mr. Justice Powell would note probable jurisdiction and set case for oral argument. Reported below: 92 Wash. 2d 52, 593 P. 2d 811.

No. 79–5285. Hawk *v.* Oregon. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 38 Ore. App. 117, 589 P. 2d 1136.

Miscellaneous Orders

No. A–264. Willis *v.* United States. C. A. 5th Cir. Application for stay, addressed to Mr. Justice Marshall and referred to the Court, denied.

No. D–181. IN RE DISBARMENT OF FREEDSON. It is ordered that Ralph Freedson, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 67, Orig. IDAHO EX REL. EVANS, GOVERNOR OF IDAHO, ET AL. *v.* OREGON ET AL. Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and 10 additional minutes allotted for that purpose. Plaintiffs also allotted an additional 10 minutes for oral argument. [For earlier order herein, see, *e. g.*, 442 U. S. 937.]

No. 73, Orig. CALIFORNIA *v.* NEVADA. Report of the Special Master received and ordered filed. Exceptions, if any, with supporting briefs to the Report may be filed by the parties within 45 days. Reply briefs, if any, to such exceptions may be filed within 30 days. [For earlier order herein, see, *e. g.*, 439 U. S. 906.]

No. 78–253. ESTES ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.;

No. 78–282. CURRY ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL.; and

No. 78–283. BRINEGAR ET AL. *v.* METROPOLITAN BRANCHES OF THE DALLAS NAACP ET AL. C. A. 5th Cir. [Certiorari granted, 440 U. S. 906.] Motion of Dallas Alliance et al. for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 78–599. SECRETARY OF THE NAVY ET AL. *v.* HUFF ET AL. C. A. D. C. Cir.; and

No. 78–1006. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* GLINES. C. A. 9th Cir. [Certiorari granted, 440 U. S. 957.] Motion of the Solicitor General to permit Kent L. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 78–1118. FORSHAM ET AL. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. D. C. Cir. [Certiorari granted *sub nom. Forsham* v. *Califano*, 441 U. S. 942.] Motion of the Solicitor General for divided argument granted.

No. 78–1201. MOBIL OIL CORP. *v.* COMMISSIONER OF TAXES OF VERMONT. Sup. Ct. Vt. [Probable jurisdiction noted, 441 U. S. 941.] Motion of Multistate Tax Commission et al. for divided argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 78–1335. VILLAGE OF SCHAUMBURG *v.* CITIZENS FOR A BETTER ENVIRONMENT ET AL. C. A. 7th Cir. [Certiorari granted, 441 U. S. 922.] Motion of Coalition of National Voluntary Organizations et al. for divided argument granted.

No. 78–1604. CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION. Sup. Ct. Ariz. [Probable jurisdiction noted, *ante*, p. 822.] Motion of appellant to dispense with printing appendix granted.

No. 78–1729. UNITED STATES *v.* PAYNER. C. A. 6th Cir. [Certiorari granted, *ante*, p. 822.] Motion of petitioner to dispense with printing appendix granted.

No. 79–8. UNITED STATES *v.* RADDATZ. C. A. 7th Cir. [Certiorari granted, *ante*, p. 824.] Motion for appointment of counsel granted, and it is ordered that Joan B. Gottschall, of Chicago, Ill., be appointed to serve as counsel for respondent in this case.

No. 79–620. SALA *v.* COUNTY OF SUFFOLK. C. A. 2d Cir. Motion of petitioner to expedite consideration of petition and to consolidate with No. 78–1779, *Owen* v. *City of Independence, Missouri, et al.* [certiorari granted, *ante*, p. 822], denied.

No. 79–5432. RICHARDSON *v.* FOTI, SHERIFF, ET AL. Motion for leave to file petition for writ of habeas corpus denied.

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No. 79–595. SCIENTISTS' INSTITUTE FOR PUBLIC INFORMATION ET AL. *v.* LONG ISLAND LIGHTING CO.; and

No. 79–629. LONG ISLAND LIGHTING CO. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL. C. A. 2d Cir. Motions of petitioners to expedite consideration of petitions and to consolidate with No. 79–134, *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission of New York* [probable jurisdiction noted, *ante*, p. 822], denied.

Probable Jurisdiction Noted

No. 79–381. WENGLER *v.* DRUGGISTS MUTUAL INSURANCE CO. ET AL. Appeal from Sup. Ct. Mo. Probable jurisdiction noted. Reported below: 583 S. W. 2d 162.

Certiorari Granted

No. 79–1. AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL. Ct. App. N. Y. Certiorari granted. Reported below: 46 N. Y. 2d 634, 389 N. E. 2d 461.

No. 79–81. COFFY *v.* REPUBLIC STEEL CORP. C. A. 6th Cir. Certiorari granted. Reported below: 590 F. 2d 334.

No. 79–136. PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS *v.* BERGY; and PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS *v.* CHAKRABARTY. C. C. P. A. Certiorari granted. Reported below: 596 F. 2d 952.

No. 79–5215. IN RE OTIS ET AL. (SUBLER, PETITIONER). Ct. App. Ohio, Van Wert County. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also No. 79–5285, *supra.*)

No. 78–1689. PALMER *v.* FEMINIST WOMEN'S HEALTH CENTER; and

No. 78–1799. MOHAMMAD ET AL. *v.* FEMINIST WOMEN'S HEALTH CENTER. C. A. 5th Cir. Certiorari denied. Reported below: 586 F. 2d 530.

No. 78–1761. BALLARD ET AL. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 65 Ill. App. 3d 831, 382 N. E. 2d 800.

No. 78–1811. TEXAS STATE BOARD OF PUBLIC ACCOUNTANCY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 919.

No. 78–1907. GEORGE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 102, 384 N. E. 2d 377.

No. 78–6801. ROGERS *v.* MALLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 78–6831. REVELS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6863. PAINE *v.* BAKER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 595 F. 2d 197.

No. 78–6901. JONES *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 386 A. 2d 308.

No. 78–6912. HOLTON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 312, 253 S. E. 2d 736.

No. 78–6928. POPE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 616.

No. 78–6936. SCOTT *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 59, 253 S. E. 2d 401.

No. 79–30. KLEIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–104. SAVE OUR WETLANDS, INC. (SOWL) *v.* ATTORNEY GENERAL OF THE UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 79–118. DELLI PAOLI *v.* UNITED STATES; and
No. 79–5121. WARME *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 1029.

No. 79–138. DELTA COMMUNICATIONS CORP. *v.* NATIONAL BROADCASTING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 579 F. 2d 972 and 590 F. 2d 100.

No. 79–147. FEDERAL EMPLOYEES FOR NON-SMOKERS' RIGHTS ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 391, 598 F. 2d 310.

No. 79–153. POTOMAC ELECTRIC POWER CO. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 402 A. 2d 14.

No. 79–154. POTOMAC ELECTIC POWER CO. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied.

No. 79–155. POTOMAC ELECTRIC POWER CO. *v.* PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA ET AL. Ct. App. D. C. Certiorari denied. Reported below: 393 A. 2d 71.

No. 79–158. HEPA CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 166.

No. 79–167. HERNANDEZ-FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 770.

No. 79–171. COOPER *v.* DEPARTMENT OF THE NAVY. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 484.

No. 79–183. WHITE AUTOMOTIVE CORP. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 594.

No. 79–189. MERCURIO *v.* UNITED STATES; FLORAMO *v.* UNITED STATES; CORSO *v.* UNITED STATES; and RHODES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 576 (second and third cases) and 577 (first and fourth cases).

No. 79–197. SKOKO ET AL., BOARD OF COUNTY COMMISSIONERS OF CLACKAMAS COUNTY, OREGON *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1154.

No. 79–215. DARK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 597 F. 2d 1097.

No. 79–217. RENO-WEST COAST DISTRIBUTION CO., INC. *v.* MEAD CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 613 F. 2d 722.

No. 79–223. GOODBAR ET AL. *v.* PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS, ET AL. C. C. P. A. Certiorari denied. Reported below: 599 F. 2d 431.

No. 79–224. COLEMAN *v.* DARDEN ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 595 F. 2d 533.

No. 79–228. TEXAS LANDOWNERS RIGHTS ASSN. ET AL. *v.* DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 392, 598 F. 2d 311.

No. 79–230. KLEINSCHMIDT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 133.

No. 79–233. WINES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1059.

No. 79–234. Old National Bank in Evansville *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–236. Placid Oil Co. *v.* Department of Energy et al. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 600 F. 2d 813.

No. 79–240. Walker *v.* Florida. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 364 So. 2d 898.

No. 79–247. Colprit *v.* Westerly School Committee. Sup. Ct. R. I. Certiorari denied. Reported below: — R. I. —, 401 A. 2d 1308.

No. 79–249. Genser et al. *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 69.

No. 79–255. Barr *v.* Nickerson, U. S. District Judge (Giacopelli et al., Real Parties in Interest). C. A. 2d Cir. Certiorari denied.

No. 79–256. Hey, Judge *v.* Hanley, Prosecuting Attorney of Kanawha County. Sup. Ct. App. W. Va. Certiorari denied. Reported below: — W. Va. —, 255 S. E. 2d 354.

No. 79–257. Rubatex Corp. *v.* National Labor Relations Board. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 147.

No. 79–262. Barclay *v.* Alabama. Ct. Crim. App. Ala. Certiorari denied. Reported below: 368 So. 2d 579.

No. 79–281. Arnheiter *v.* Sheehan et al.; Arnheiter *v.* Dell Publishing Co., Inc., et al.; and Brownlow *v.* RCA Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 994.

No. 79–269. LORENZ, GUARDIAN, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1057.

No. 79–286. THOMASSEN *v.* COMMISSIONER OF INTERNAL REVENUE; and

No. 79–290. THOMASSEN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied.

No. 79–292. FILE ET AL. *v.* ALASKA. Sup. Ct. Alaska. Certiorari denied. Reported below: 593 P. 2d 268.

No. 79–294. CALHOUN *v.* HOLMES, JUDGE, ET AL. Sup. Ct. Ohio. Certiorari denied.

No. 79–299. BURRUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–303. SPAULDING *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 68 Ill. App. 3d 663, 386 N. E. 2d 469.

No. 79–310. NIX *v.* SWEENEY. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 281.

No. 79–311. GENERAL ADJUSTMENT BUREAU, INC., ET AL. *v.* MAC ADJUSTMENT, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 597 F. 2d 1318.

No. 79–314. HILL ET AL. *v.* WESTERN ELECTRIC CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 596 F. 2d 99.

No. 79–322. TOLEDO, PEORIA & WESTERN RAILROAD CO. *v.* DEPARTMENT OF TRANSPORTATION OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 75 Ill. 2d 436, 389 N. E. 2d 546.

No. 79–334. SWAINSON *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 79–325. GRAND BAHAMA DEVELOPMENT CO., LTD., ET AL. *v.* ANDERSON ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 687, 384 N. E. 2d 981.

No. 79–331. TOLEDO, PEORIA & WESTERN RAILROAD CO. *v.* BURLINGTON NORTHERN, INC. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 928, 385 N. E. 2d 937.

No. 79–336. GUARDIAN INDUSTRIES CORP. *v.* PPG INDUSTRIES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 597 F. 2d 1090.

No. 79–342. REED *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 271, 595 P. 2d 916.

No. 79–344. RENFORTH *v.* FAYETTE MEMORIAL HOSPITAL ASSN. ET AL. Ct. App. Ind. Certiorari denied. Reported below: —— Ind. App. ——, 383 N. E. 2d 368.

No. 79–345. CHISHOLM *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–346. KERRIGAN *v.* FAIR EMPLOYMENT PRACTICE COMMISSION OF CALIFORNIA ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 91 Cal. App. 3d 43, 154 Cal. Rptr. 29.

No. 79–348. EQUIPMENT RENTAL CORP., T/A AMERICAN EQUIPMENT RENTAL CO. *v.* TIDEWATER EQUIPMENT CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 859.

No. 79–353. GELFONT *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 264 Pa. Super. 96, 399 A. 2d 414.

No. 79–365. CITIZENS UTILITIES CO. ET AL. *v.* AMERICAN TELEPHONE & TELEGRAPH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1171.

No. 79–369. HIRSCH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 400, 600 F. 2d 280.

No. 79–370. SCHOOL DISTRICT OF PHILADELPHIA *v.* LAFFERTY ET AL. Pa. Commw. Ct. Certiorari denied.

No. 79–384. BENSON *v.* AMERICAN EXPORT ISBRANDTSEN LINES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 573.

No. 79–387. BOINEAU *v.* TARR INVESTMENTS ET AL. Sup. Ct. S. C. Certiorari denied.

No. 79–398. PALM *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. D. C. Cir. Certiorari denied.

No. 79–399. CINCINNATI BENGALS, INC., ET AL. *v.* HACKBART. C. A. 10th Cir. Certiorari denied. Reported below: 601 F. 2d 516.

No. 79–405. DELYRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 999.

No. 79–406. ESTATE OF SCOTT *v.* UNIVERSITY OF DELAWARE ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 76.

No. 79–433. ARNHEITER *v.* RANDOM HOUSE, INC., ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 79–441. GRIFFITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–444. FERNOS-LOPEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 599 F. 2d 1087.

No. 79–446. KINSEY, EXECUTRIX *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–447. WILLIAMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 495.

No. 79–453. CAPITANO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 79–455. INENDINO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 604 F. 2d 458.

No. 79–459. LOCAL 736, WILLIAMSPORT FIREFIGHTERS, ET AL. *v.* CITY OF WILLIAMSPORT ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 575.

No. 79–473. WORLD CARPETS, INC., ET AL. *v.* ARMSTRONG CORK CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 496.

No. 79–484. WALTERS *v.* McLUCAS, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1230.

No. 79–522. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 387.

No. 79–540. SOUTHERN OREGON BROADCASTING CO., DBA SOUTHERN OREGON CABLE TV *v.* DEPARTMENT OF REVENUE OF OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 287 Ore. 35, 597 P. 2d 795.

No. 79–5009. BRYANT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5035. IN RE HAYES ET AL. Ct. App. Ohio, Stark County. Certiorari denied.

No. 79–5051. ELLIOTT *v.* THOMPSON, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 767.

No. 79–5066. AGNES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 576.

No. 79–5067. NOEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5068. BELITZ *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 203 Neb. 375, 278 N. W. 2d 769.

No. 79–5078. HUDSPETH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–5110. LOVE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1226.

No. 79–5119. CAMPBELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 299, 254 S. E. 2d 389.

No. 79–5137. LEE *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 79–5147. SCHEUFLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 893.

No. 79–5157. COMPTON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 603.

No. 79–5162. LEUSCHNER *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 41 Md. App. 423, 397 A. 2d 622.

No. 79–5163. ROWTON *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied.

No. 79–5167. ANDERSON *v.* UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. C. A. 6th Cir. Certiorari denied.

No. 79–5170. MIERA *v.* UNITED STATES;
No. 79–5172. HENDERSON ET AL. *v.* UNITED STATES; and
No. 79–5182. SIMMONS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5178. HAYES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5202. CAPERS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 403 A. 2d 1155.

No. 79–5209. TERRY *v.* MOULTRIE, CHIEF JUDGE, SUPERIOR COURT OF THE DISTRICT OF COLUMBIA. Ct. App. D. C. Certiorari denied.

No. 79–5210. NOEL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–5214. FREDERICKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 1358.

No. 79–5233. PROUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1053.

No. 79–5250. CARTER *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 587.

No. 79–5253. LOVELL *v.* EISENSTADT, SHERIFF, ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 572.

No. 79–5271. WOOD *v.* CATANIA, JUDGE. C. A. 3d Cir. Certiorari denied.

No. 79–5274. CORDER *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 373 So. 2d 611.

No. 79–5276. CAMPBELL *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 365 So. 2d 751.

No. 79–5286. McNAIR ET AL. *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 68 Ill. App. 3d 941, 386 N. E. 2d 416.

No. 79–5289. SPELLMAN ET AL. *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 40 N. C. App. 591, 253 S. E. 2d 320.

No. 79–5294. JOHNSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 79–5297. PATTERSON ET AL. *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 386 N. E. 2d 936.

No. 79–5298. McMANUES *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5299. DEUTSCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 46.

No. 79–5300. PISKORSKI *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 177 Conn. 677, 419 A. 2d 866.

No. 79–5306. HOLMES *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied.

No. 79–5307. McCULLEY ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–5310. BILLIOT *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 370 So. 2d 539.

No. 79–5315. CHASE *v.* KENNEDY, UNITED STATES SENATOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 561.

No. 79–5316. ARNOLD ET UX. *v.* BRUEGMAN ET UX. Ct. App. Ore. Certiorari denied. Reported below: 38 Ore. App. 319, 589 P. 2d 1213.

No. 79–5318. MALIN *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–5331. HERSHIPS *v.* PRANSKY. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 224.

No. 79–5332. BRADFORD *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 839, 256 S. E. 2d 84.

No. 79–5334. ELLISON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–5340. STRUGGS *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 372 So. 2d 49.

No. 79–5341. W. D. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied.

No. 79–5342. PAGE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 968, 393 N. E. 2d 1031.

No. 79–5343. BENNETT *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 613.

No. 79–5344. DOUGLAS ET AL. *v.* SWOOPE, SHERIFF. Sup. Ct. Va. Certiorari denied.

No. 79–5346. POWELL *v.* OHIO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79–5356. GREEN *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5380. YODER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5381. COOK *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 2d 117.

No. 79–5385. SIBLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1162.

No. 79–5390. NIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 214.

No. 79–5394. ROWEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 535.

No. 79–5400. DIGREGORIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 605 F. 2d 1184.

No. 79–5421. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 619.

No. 79–5423. CARRENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 680.

No. 79–5427. HORTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 319.

No. 79–132. CALIFORNIA *v.* LITTLE. Ct. App. Cal., 3d App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 89 Cal. App. 3d 809, 153 Cal. Rptr. 89.

No. 79–323. MARYLAND *v.* POWERS. Ct. App. Md. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 285 Md. 269, 401 A. 2d 1031.

No. 79–361. MASSACHUSETTS *v.* TAGLIERI. Sup. Jud. Ct. Mass. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 378 Mass. 196, 390 N. E. 2d 727.

No. 79–371. BUTTERWORTH, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* WALKER. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 599 F. 2d 1074.

No. 79–312. CORENSWET, INC. *v.* AMANA REFRIGERATION, INC. C. A. 5th Cir. Motion of National Franchise Association Coalition for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 594 F. 2d 129.

No. 79–364. NICKERSON *v.* CITY OF NORFOLK. Sup. Ct. Va. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

Rehearing Denied

No. 78–6637. HENRY *v.* FLORIDA, *ante*, p. 885. Petition for rehearing denied.

NOVEMBER 5, 1979*

Appeals Dismissed

No. 79–208. KAPLAN, DBA INSJARL REALTY CO. *v.* PRINCE ET AL. Appeal from App. Div., Sup. Ct. N. Y., 1st Jud. Dept., dismissed for want of substantial federal question. Reported below: 67 App. Div. 2d 1110, 412 N. Y. S. 2d 717.

No. 79–237. GREENBERG *v.* NEW JERSEY. Appeal from Super. Ct. N. J. dismissed for want of substantial federal question.

Miscellaneous Orders

No. A–291. NATIONAL RAILROAD PASSENGER CORP. *v.* KANSAS EX REL. STEPHAN, ATTORNEY GENERAL OF KANSAS, ET AL. C. A. 10th Cir. Motion for reconsideration of order entered by MR. JUSTICE WHITE, dated October 8, 1979, denied.

No. A–314 (79–5495). MILLER v. UNITED STATES. C. A. 5th Cir. Application for stay, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

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*MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders announced on this date.

No. A–322. HANKINS *v.* UNITED STATES ET AL. C. A. 5th Cir. Application for bail pending appeal, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. D–169. IN RE DISBARMENT OF CARNOW. Donald S. Carnow, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause heretofore issued on May 29, 1979 [442 U. S. 908], is hereby discharged.

No. 78–1945. UNIVERSITIES RESEARCH ASSN., INC. *v.* COUTU. C. A. 7th Cir. The Solicitor General is invited to file a brief in this case expressing the view of the United States.

No. 78–6029. LAROCCA *v.* UNITED STATES. The order of this Court, dated October 1, 1979, *ante*, p. 820, appointing Michael A. Litman, Esquire, of Pittsburgh, Pa., as counsel for petitioner is vacated.

No. 79–5010. BIFULCO *v.* UNITED STATES. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of Phylis Skloot Bamberger for appointment of counsel granted, and it is ordered that Steven Lloyd Barrett, Esquire, of New York, N. Y., be appointed to serve as counsel for petitioner in this case.

Certiorari Granted

No. 79–394. UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS. C. A. 10th Cir. Certiorari granted. Reported below: 598 F. 2d 1187.

No. 79–424. BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK ET AL. *v.* TOMANIO. C. A. 2d Cir. Certiorari granted. Reported below: 603 F. 2d 255.

Certiorari Denied

No. 78–1913. MYTNIK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 624, 384 N. E. 2d 435.

No. 78–6879. FIELDS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 78–6903. DYKES *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 403, 383 N. E. 2d 1210.

No. 78–6905. ADAMS *v.* HULL ET AL. C. A. 5th Cir. Certiorari denied.

No. 78–6926. MOSLEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 74 Ill. 2d 527, 387 N. E. 2d 325.

No. 79–82. GARCIA ET AL. *v.* FRIESECKE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 597 F. 2d 284.

No. 79–119. VEITCH *v.* SUPERIOR COURT, COUNTY OF SANTA CLARA, CALIFORNIA (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 89 Cal. App. 3d 722, 152 Cal. Rptr. 822.

No. 79–128. CONSTANTINO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 595, 255 S. E. 2d 710.

No. 79–137. STEWART *v.* VIRGINIA. Cir. Ct. Fairfax County, Va. Certiorari denied.

No. 79–172. DON BURGESS CONSTRUCTION CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 596 F. 2d 378.

No. 79–220. WILLIAMS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–282. In re Aladdin Hotel Corp. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1209.

No. 79–301. R & T Construction Co., Inc., et al. *v.* St. Louis-San Francisco Railway Co. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 862.

No. 79–306. American Motors Corp. et al. *v.* Federal Trade Commission et al. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 1329.

No. 79–309. Renfro *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 600 F. 2d 55.

No. 79–318. Torquato *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 564.

No. 79–328. Gomez-Martinez *v.* Immigration and Naturalization Service. C. A. 5th Cir. Certiorari denied. Reported below: 593 F. 2d 10.

No. 79–335. Shell Oil Co. et al. *v.* West Michigan Environmental Action Council, Inc., et al. Sup. Ct. Mich. Certiorari denied. Reported below: 405 Mich. 741, 275 N. W. 2d 538.

No. 79–363. Madden et al. *v.* Mercantile-Safe Deposit & Trust Co., Trustee, et al. Ct. Sp. App. Md. Certiorari denied. Reported below: 41 Md. App. 519, 398 A. 2d 460.

No. 79–368. Calig & Waterman et al. *v.* Supreme Court of Ohio et al. Sup. Ct. Ohio. Certiorari denied.

No. 79–388. Rudisill *v.* Western International Hotels Co. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 599.

No. 79–401. Board of Commissioners of the Mississippi State Bar *v.* Federal Land Bank of New Orleans. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 459.

No. 79–402. SANDSTROM *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 225 Kan. 717, 595 P. 2d 324.

No. 79–411. O. P. MURPHY PRODUCE CO., INC., DBA O. P. MURPHY & SONS *v.* AGRICULTURAL LABOR RELATIONS BOARD OF CALIFORNIA (UNITED FARM WORKERS OF AMERICA, AFL–CIO, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–414. BASIC INC. *v.* ELTRA CORP. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 745.

No. 79–430. NEW JERSEY ET AL. *v.* MONMOUTH MEDICAL CENTER. Sup. Ct. N. J. Certiorari denied. Reported below: 80 N. J. 299, 403 A. 2d 487.

No. 79–431. ROBINSON *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 58 Ohio St. 2d 478, 391 N. E. 2d 317.

No. 79–451. FRAKES *v.* HUNT ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 266 Ark. 171, 583 S. W. 2d 497.

No. 79–454. SHURE BROTHERS, INC. *v.* KORVETTES, INC., DBA E. J. KORVETTE. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–514. SINAGUB *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–543. SECURITY TIRE & RUBBER CO. *v.* GATES RUBBER CO. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 962.

No. 79–548. DIZON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 604.

No. 79–557. TOWN & COUNTRY ESTATES, INC. *v.* FONG. C. A. 8th Cir. Certiorari denied. Reported below: 600 F. 2d 179.

No. 79–572. CARLONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 63.

No. 79–581. LEAGUE TO SAVE LAKE TAHOE, INC., ET AL. *v.* TROUNDAY, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES OF NEVADA, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 598 F. 2d 1164.

No. 79–5022. HOLLAND *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1223.

No. 79–5023. PEDRERO *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 1383.

No. 79–5041. HORNER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 79–5065. HERKO *v.* UNITED STATES; and
No. 79–5085. GUGLIELMINI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 598 F. 2d 1149.

No. 79–5077. MCGUIRE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 297 N. C. 69, 254 S. E. 2d 165.

No. 79–5087. COLEMAN *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 861.

No. 79–5112. MAIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 598 F. 2d 1086.

No. 79–5117. CRISAFI *v.* FENTON, WARDEN. Ct. App. D. C. Certiorari denied.

No. 79–5125. RUIZ *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–5150. RASCON *v.* UNITED STATES; and
No. 79–5152. LAGUNAS-JARAMILLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: No. 79–5150, 603 F. 2d 227; No. 79–5152, 603 F. 2d 226.

No. 79–5187. DECOSTER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 392, 598 F. 2d 311.

No. 79–5239. JOHNSON *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 390 N. E. 2d 1005.

No. 79–5240. LOVE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 107.

No. 79–5348. DELVECCHIO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 605 F. 2d 1184.

No. 79–5352. CLOUDY *v.* DRAKE; and
No. 79–5366. CLOUDY *v.* DRAKE. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 560.

No. 79–5355. MAHLER *v.* WEISS. C. A. D. C. Cir. Certiorari denied.

No. 79–5358. OLIVER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied.

No. 79–5359. JACK *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 589.

No. 79–5362. HERRERA *v.* ROMERO. C. A. 10th Cir. Certiorari denied.

No. 79–5363. LASHWAY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 1062, 417 N. Y. S. 2d 153.

No. 79–5372. KELLY *v.* WILLIAMS, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 581.

No. 79–5377. BEALS *v.* WILSON ET AL. Sup. Ct. Colo. Certiorari denied.

No. 79–5388. WOJLOH *v.* ADDISON ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 79–5406. ORIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 428.

No. 79–5407. STEVENS *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 225.

No. 79–5408. CLAYTON *v.* COUNTY OF MONTEREY ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5410. KASONOVITCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5420. WILSON *v.* FIRST VALLEY BANK. C. A. 3d Cir. Certiorari denied.

No. 79–5424. JAFREE *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 595.

No. 79–5445. MALTBY *v.* COX CONSTRUCTION CO., INC., ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 598 P. 2d 336.

No. 79–5461. LUJAN-CASTRO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 877.

No. 79–5472. ESTRADA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5478. CONVERY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–5487. ROBINSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 78–6821. STANLEY *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 596 F. 2d 332.

No. 79–182. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA *v.* GUNSBY. C. A. 5th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 596 F. 2d 654.

No. 79–450. NEW YORK *v.* JONES. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 47 N. Y. 2d 409, 391 N. E. 2d 1335.

No. 79–298. RUSSELL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 592 F. 2d 1069.

No. 79–362. HALL, CORRECTIONS COMMISSIONER *v.* PETTIJOHN. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 599 F. 2d 476.

No. 79–428. HUNT *v.* NORTHWEST AIRLINES, INC. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition.† Reported below: 600 F. 2d 176.

Rehearing Denied

No. 78–1504. CRUZ *v.* UNITED STATES, *ante*, p. 898; and No. 78–6424. PONTING *v.* CALIFORNIA, *ante*, p. 845. Petitions for rehearing denied.

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†See also note, *supra*, p. 938.

No. 78–6601. NELSON *v.* UNITED STATES, *ante*, p. 847;

No. 78–6689. GEHRING *v.* CRIST, WARDEN, *ante*, p. 851;

No. 78–6851. POWELL *v.* GRADDICK, ATTORNEY GENERAL OF ALABAMA, ET AL., *ante*, p. 859;

No. 78–6869. TILLI *v.* PENNSYLVANIA, *ante*, p. 860;

No. 78–6918. HEGWOOD *v.* LANDRY ET AL., *ante*, p. 862;

No. 79–5018. UDELL *v.* STATE DEPARTMENT OF MASSACHUSETTS ET AL., *ante*, p. 872; and

No. 79–5019. POTEMRA *v.* PING ET AL., *ante*, p. 872. Petitions for rehearing denied.

NOVEMBER 9, 1979

Miscellaneous Order

No. A–381. MASSACHUSETTS ET AL. *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL. Order entered by MR. JUSTICE BRENNAN on November 6, 1979, is vacated and application for stay denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this application.

NOVEMBER 13, 1979*

Appeals Dismissed

No. 78–6887. MEZA *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 577 S. W. 2d 705.

No. 79–69. KELLY *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 484 Pa. 527, 399 A. 2d 1061.

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*MR. JUSTICE MARSHALL took no part in the consideration or decision of the orders announced on this date.

No. 79–472. SMITH *v.* OREGON. Appeal from Ct. App. Ore. dismissed for want of substantial federal question. Reported below: 39 Ore. App. 608, 594 P. 2d 440.

No. 79–502. STRIKE ET UX. *v.* TRANS-WEST DISCOUNT CORP. ET AL. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of substantial federal question. Reported below: 92 Cal. App. 3d 735, 155 Cal. Rptr. 132.

No. 79–5506. BRINTLEY ET AL. *v.* MICHIGAN. Appeal from Sup. Ct. Mich. dismissed for want of substantial federal question. Reported below: 406 Mich. 374, 280 N. W. 2d 793.

Miscellaneous Orders

No. 78–1007. FULLILOVE ET AL. *v.* KREPS, SECRETARY OF COMMERCE, ET AL. C. A. 2d Cir. [Certiorari granted, 441 U. S. 960.] Motion of petitioners General Building Contractors of New York, Inc., et al. for divided argument granted.

No. 78–1369. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY ET AL. *v.* REGAN, COMPTROLLER OF NEW YORK, ET AL. D. C. S. D. N. Y. [Probable jurisdiction noted, 442 U. S. 928.] Motion of appellees for divided argument granted.

No. 78–1487. FORD MOTOR CREDIT CO. ET AL. *v.* MILHOLLIN ET AL. C. A. 9th Cir. [Certiorari granted, 442 U. S. 940.] Motion of petitioners for divided argument granted.

No. 78–1548. CALIFORNIA BREWERS ASSN. ET AL. *v.* BRYANT ET AL. C. A. 9th Cir. [Certiorari granted, 442 U. S. 916.] Motion of petitioners and respondent unions for additional time for oral argument denied. The alternative request for divided argument granted. Motion of respondent Bryant for divided argument granted.

No. 78–1780. CROWELL, SECRETARY OF STATE OF TENNESSEE, ET AL. *v.* MADER ET AL., *ante*, p. 806. Appellants requested to file a response to petition for rehearing within 30 days.

Probable Jurisdiction Noted or Postponed

No. 79–253. MARSHALL, SECRETARY OF LABOR, ET AL. *v.* JERRICO, INC. Appeal from D. C. D. C. Probable jurisdiction noted.

No. 79–289. PRUNEYARD SHOPPING CENTER ET AL. *v.* ROBINS ET AL. Appeal from Sup. Ct. Cal. Further consideration of question of jurisdiction postponed to hearing of case on the merits. Reported below: 23 Cal. 3d 899, 592 P. 2d 341.

Certiorari Denied. (See also Nos. 78–6887 and 79–69, *supra.*)

No. 78–1850. PRIVITERA *v.* CALIFORNIA; and

No. 79–5049. TURNER ET AL. *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 23 Cal. 3d 697, 591 P. 2d 919.

No. 78–6823. ADAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 907.

No. 78–6853. VIRES *v.* CAREY, STATE'S ATTORNEY OF COOK COUNTY. Sup. Ct. Ill. Certiorari denied.

No. 78–6922. PHILLIPS *v.* NIGH, GOVERNOR OF OKLAHOMA, ET AL. Sup. Ct. Okla. Certiorari denied.

No. 79–139. BLITSTEIN *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied.

No. 79–177. JACKA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–212. FRANCIS-SOBEL *v.* UNIVERSITY OF MAINE ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 597 F. 2d 15.

No. 79–216. PAPPAS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 131.

No. 79–283. GIBBONS *v.* UNITED STATES; and
No. 79–5256. PERRY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 1044.

No. 79–330. MATSUI ET AL. *v.* PARKER, ACTING COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied. Reported below: 193 U. S. App. D. C. 217, 593 F. 2d 1371.

No. 79–332. MEDDOWS *v.* ILLINOIS. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 995, 385 N. E. 2d 765.

No. 79–350. BUCK, SECRETARY OF HEALTH AND MENTAL HYGIENE OF MARYLAND *v.* KIMBLE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 599.

No. 79–380. WHITAKER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 826.

No. 79–417. FIRST NATIONAL BANK OF MONTEREY *v.* FIRST UNION BANK & TRUST COMPANY OF WINAMAC, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 2d 91.

No. 79–426. MOELLER *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 178 Conn. 67, 420 A. 2d 1153.

No. 79–437. MAHONEY, CORRECTIONAL SUPERINTENDENT *v.* WYNN. C. A. 4th Cir. Certiorari denied. Reported below: 600 F. 2d 448.

No. 79–439. WHITE *v.* CALIFORNIA. App. Dept., Super. Ct. Cal., County of San Diego. Certiorari denied.

No. 79–443. QUAM *v.* MOBIL OIL CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 42.

No. 79–445. BARRAZA *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 738, 256 S. E. 2d 48.

No. 79–452. OCEAN GROVE CAMP MEETING ASSOCIATION OF THE UNITED METHODIST CHURCH *v.* CELMER. Sup. Ct. N. J. Certiorari denied. Reported below: 80 N. J. 405, 404 A. 2d 1.

No. 79–466. MILLROOD *v.* HEWITT, CORRECTIONAL SUPERINTENDANT, ET AL.; and KIRCHNER *v.* JOHNSTONE, JUDGE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 575 (first case); 601 F. 2d 577 (second case).

No. 79–467. CHIEF PADUKE DISTRIBUTING CO. *v.* WILSON ET AL. Ct. App. Ky. Certiorari denied. Reported below: 585 S. W. 2d 450.

No. 79–468. WINEGARD *v.* GILVIN, AKA WINEGARD. Sup. Ct. Iowa. Certiorari denied. Reported below: 278 N. W. 2d 505.

No. 79–474. INDIANA EMPLOYMENT SECURITY BOARD ET AL. *v.* INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 2d 118.

No. 79–480. CARPENTERS DISTRICT COUNCIL OF DETROIT, WAYNE, OAKLAND, AND MACOMB COUNTIES, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, ET AL. *v.* MORSE, DBA RESIDENTIAL FRAMERS CO., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 587.

No. 79–493. WHITE *v.* MARION SUPERIOR COURT, CRIMINAL DIVISION, NO. 3, ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 391 N. E. 2d 596.

No. 79–500. DAVANNE REALTY CO. ET AL. *v.* MAYOR OF MONTVILLE TOWNSHIP ET AL. Super. Ct. N. J. Certiorari denied.

No. 79–532. HARTE *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 87 Cal. App. 3d 419, 151 Cal. Rptr. 88.

No. 79–587. PINERO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 991.

No. 79–596. PEACH *v.* GOVERNMENT OF THE CANAL ZONE. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 101.

No. 79–634. QUINZIO *v.* MILLER ET AL. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 64 App. Div. 2d 1036, 409 N. Y. S. 2d 471.

No. 79–5183. FERRELL *v.* DOWNES, PENITENTIARY SUPERINTENDENT. Sup. Ct. Va. Certiorari denied.

No. 79–5218. BURKS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 401, 600 F. 2d 281.

No. 79–5236. BROWN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 1073.

No. 79–5241. JONES ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–5270. CLAYTON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 79–5275. HUFF *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 860.

No. 79–5283. DEMANDRE *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1088.

No. 79–5319. GIBSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 79–5320. KELLY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 401, 600 F. 2d 281.

No. 79–5375. MADDEN *v.* GARRISON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 615.

No. 79–5378. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5379. LINGERFELT *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 79–5382. CONSALVO *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 372 So. 2d 49.

No. 79–5387. DIXON *v.* REDMAN, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5389. SOLOMON *v.* JOLLIFFE. Sup. Ct. App. W. Va. Certiorari denied.

No. 79–5397. NAGEL *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 39 Ore. App. 607, 594 P. 2d 440.

No. 79–5398. GEORGE *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 371 So. 2d 762.

No. 79–5399. TORGERSON *v.* MCCLAY. C. A. 2d Cir. Certiorari denied.

No. 79–5402. MORALES-ALVIRA *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 572.

No. 79–5403. FLORENCE *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 738, 256 S. E. 2d 467.

No. 79–5405. GARRETT *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 580.

No. 79–5412. LANE *v.* GREER, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 79–5413. GILBERT *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 585 S. W. 2d 444.

No. 79–5415. GARRETT *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1202.

No. 79–5416. GARRETT *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79–5417. GARRETT *v.* BRABHAM ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79–5419. FRENCH *v.* NEW HAMPSHIRE. Sup. Ct. N. H. Certiorari denied. Reported below: 119 N. H. 500, 403 A. 2d 424.

No. 79–5422. YANCEY *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 220.

No. 79–5425. LANG *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 311, 391 N. E. 2d 350.

No. 79–5435. MUDD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79–5453. SOTO-MONTES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79–5473. CONNLEY *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 297 N. C. 584, 256 S. E. 2d 234.

No. 79–5474. HARBIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 773.

No. 79–5491. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5494. SUTTON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79–5495. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 498.

No. 79–5497. RIGGS *v.* FLAMM, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5498. RIGGS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79–5500. WAITE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 259.

No. 79–5502. YOUNG *v.* UNITED STATES AIR FORCE VOLUNTARY INDUCTION TESTING CENTER AT INDIANAPOLIS, INDIANA. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1008.

No. 79–203. OCHS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 595 F. 2d 1247.

No. 79–5047. BRITTON *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 578 S. W. 2d 685.

No. 79–347. CITY OF LOS ANGELES, CALIFORNIA, ET AL. *v.* GOLDSCHMIDT, SECRETARY OF TRANSPORTATION, ET AL. C. A. D. C. Cir. Motion of Airport Operators Council International for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 194 U. S. App. D. C. 399 and 400, 600 F. 2d 279 and 280.

No. 79–456. ARNALL, GOLDEN & GREGORY ET AL. *v.* SMITH, COHEN, RINGEL, KOHLER & MARTIN ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 593 F. 2d 642.

No. 79–5114. WARREN *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 369 So. 2d 483.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

I dissent from the denial of certiorari. Here, while on their way to investigate a reported disturbance and possible burglary in progress, squad car officers encountered a pedestrian, the petitioner, a block or two from the reported disturbance. He was splattered with blood and had a bloody hand. He explained that he had been in a fight in a nightclub and was headed for home. Some of his answers apparently were improbable, for the officers placed him in the squad car and proceeded to their destination, where investigation immediately revealed the victim of a brutal and bloody murder. When a detective arrived, he placed petitioner under arrest, took him to the police station and sent his clothes to a laboratory for examination. He was later charged with murder. Because he thought petitioner's initial detention had been unlawful, the trial judge suppressed any evidence which was gathered between the time petitioner was first placed in the squad car and the time he was formally arrested. Finding, however, that once the murder had been discovered there was probable cause for the arrest, he refused to suppress the petitioner's clothes, the results of their examination, and any other evidence that was the fruit of the arrest. Petitioner was convicted.

The Supreme Court of Mississippi affirmed, holding the challenged evidence admissible on the ground that it was the product of a proper investigative stop and detention, rather than on the ground of a valid arrest based on probable cause.

The latter would be defensible; but the former, as I understand the holding, cannot be squared with our relevant cases, the most recent being *Dunaway* v. *New York*, 442 U. S. 200 (1979), which was not issued until after the decision below. It is frequently said that we review judgments, not opinions, and it is true that certiorari is sometimes denied when a judgment can be defended on a ground not relied on by the court below. But to avoid possible misapprehension by Mississippi law enforcement officers that investigative detentions on less than probable cause are constitutionally acceptable, I would at least vacate the judgment of the Mississippi Supreme Court and remand it to that court for reconsideration in the light of *Dunaway* v. *New York*, *supra*.

No. 79–5247. SHAW *v.* SOUTH CAROLINA. Sup. Ct. S. C.;

No. 79–5376. JONES *v.* GEORGIA. Sup. Ct. Ga.; and

No. 79–5395. SPIVEY *v.* ZANT, WARDEN. Super. Ct. Ga., Butts County. Certiorari denied. Reported below: No. 79–5247, 273 S. C. 194, 255 S. E. 2d 799; No. 79–5376, 243 Ga. 820, 256 S. E. 2d 907.

MR. JUSTICE BRENNAN, dissenting.

Adhering to my views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976), I would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–1512. SCHWARTZ *v.* GILSTER, SHERIFF, *ante*, p. 825;

No. 78–1911. ROBERT L. GUYLER CO. *v.* UNITED STATES, *ante*, p. 843;

No. 78–6657. SAYLES *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL., *ante*, p. 820;

No. 78–6695. PRESNELL *v.* GEORGIA, *ante*, p. 885; and

No. 78–6733. BARNETT ET UX. *v.* COX, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 821. Petitions for rehearing denied.

No. 78–6881. PRASAD *v.* MERGES, DIRECTOR OF DEVELOPMENTAL CENTER, ET AL., *ante*, p. 861;

No. 79–160. CONNELLY *v.* COMMERCIAL TRADING CO., INC., *ante*, p. 869;

No. 79–251. SAPPINGTON *v.* BECKERT, JUDGE, ET AL., *ante*, p. 891;

No. 79–5131. MONTGOMERY *v.* UNITED STATES, *ante*, p. 876;

No. 79–5148. MEREDITH *v.* MACDOUGALL, CORRECTIONS DIRECTOR, ET AL., *ante*, p. 877;

No. 79–5185. GARCIA *v.* INDIANA, *ante*, p. 901;

No. 79–5194. PAGE *v.* CALIFORNIA, *ante*, p. 901; and

No. 79–5226. GREER *v.* UNITED STATES, *ante*, p. 902. Petitions for rehearing denied.

NOVEMBER 19, 1979

Dismissal Under Rule 60

No. 79–5409. MCDERMOTT *v.* NATIONS ET AL. Sup. Ct. Mo. Certiorari dismissed under this Court's Rule 60. Reported below: 580 S. W. 2d 249.

NOVEMBER 26, 1979

Appeals Dismissed

No. 79–458. DONNER *v.* ANTON ET AL. Appeal from Dist. Ct. App. Fla., 3d Dist., dismissed as jurisdictionally out of time. Reported below: 364 So. 2d 753.

No. 79–513. JENNINGS *v.* MOORE ET AL. Appeal from Sup. Ct. Iowa dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–549. SMART *v.* CALIFORNIA. Appeal from Ct. App. Cal., 2d App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–5374. TOPHAM *v.* KNIGHT ADJUSTMENT BUREAU. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–610. HOLWAY ET AL. *v.* ENGLAND ET AL., DBA FEATHERSTONE SQUARE. Appeal from Sup. Ct. Va. dismissed for want of substantial federal question.

Certiorari Granted—Vacated and Remanded

No. 77–1717. FIRST HOUSTON INVESTMENT CORP. ET AL. *v.* WILSON. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis, ante,* p. 11. Reported below: 566 F. 2d 1235.

No. 78–463. CHESTNUTT MANAGEMENT CORP. *v.* MILLER. C. A. 2d Cir. Motion of Investment Counsel Association of America, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Transamerica Mortgage Advisors, Inc.* v. *Lewis, ante,* p. 11. Reported below: 578 F. 2d 1368.

Miscellaneous Orders

No. A–350 (79–740). ARTHUR *v.* UNITED STATES. C. A. 4th Cir. Application for stay, addressed to MR. JUSTICE REHNQUIST and referred to the Court, denied.

No. A–371. CRYSTAL THEATER, INC., ET AL. *v.* WADE, DISTRICT ATTORNEY OF DALLAS COUNTY, ET AL. D. C. N. D. Tex. Application for stay, addressed to MR. JUSTICE STEWART and referred to the Court, denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant the application.

No. 78–1175. HATZLACHH SUPPLY CO., INC. *v.* UNITED STATES. Ct. Cl. [Certiorari granted, 441 U. S. 942.] Motion of the Solicitor General to permit Kent L. Jones, Esquire, to present oral argument *pro hac vice* granted.

No. 78–1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORP. ET AL. C. A. 7th Cir. [Certiorari granted, 442 U. S. 940.] Motion of General Motors Corp. for leave to file a brief as *amicus curiae* granted.

No. 78–1577. SEARS, ROEBUCK & Co. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante*, p. 823.] Motion of Charles R. Ajalat et al. for leave to file a brief as *amici curiae* granted, and motion for leave to participate in oral argument as *amici curiae* denied. MR. JUSTICE STEWART took no part in the consideration or decision of these motions.

No. 78–1651. SEATRAIN SHIPBUILDING CORP. ET AL. *v.* SHELL OIL CO. ET AL. C. A. D. C. Cir. [Certiorari granted, 442 U. S. 940.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* on behalf of federal respondents granted.

No. 78–1756. UNITED STATES *v.* MITCHELL ET AL. Ct. Cl. [Certiorari granted, 442 U. S. 940.] Motion of Chloe Whiskers et al. for leave to file a brief as *amici curiae* denied.

No. 78–1821. UNITED STATES *v.* MENDENHALL. C. A. 6th Cir. [Certiorari granted, *ante*, p. 822.] Motion of respondent for leave to proceed further herein *in forma pauperis* granted.

No. 79–64. ZBARAZ ET AL. *v.* QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. C. A. 7th Cir. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied. Motion of Alan Ernest for appointment as counsel for children unborn and born alive denied.

No. 79–67. WALTER *v.* UNITED STATES; and

No. 79–148. SANDERS ET AL. *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, *ante*, p. 914.] Motion of petitioners for divided argument granted.

No. 79–97. California Retail Liquor Dealers Assn. *v.* Midcal Aluminum, Inc., et al. Ct. App. Cal., 3d App. Dist. [Certiorari granted, *ante*, p. 824.] Motion of the State of California for divided argument granted. Mr. Justice Brennan took no part in the consideration or decision of this motion.

No. 79–381. Wengler *v.* Druggists Mutual Insurance Co. et al. Sup. Ct. Mo. [Probable jurisdiction noted, *ante*, p. 924.] Motion of appellant to dispense with printing appendix granted.

No. 79–408. City of Milwaukee et al. *v.* Illinois et al. C. A. 7th Cir.;

No. 79–571. Illinois *v.* City of Milwaukee et al. C. A. 7th Cir.; and

No. 79–552. Mitsui & Co., Ltd., et al. *v.* Industrial Investment Development Corp. et al. C. A. 5th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–5567. Baker *v.* Georgia. Sup. Ct. Ga. Motion of petitioner to expedite consideration of petition denied.

No. 79–5553. Goodson *v.* Civiletti, Attorney General, et al.; and

No. 79–5561. Brown *v.* Blackburn, Warden. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–5345. Winkle *v.* Greisa, U. S. District Judge, et al. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Postponed

No. 79–509. Exxon Corp. *v.* Department of Revenue of Wisconsin. Appeal from Sup. Ct. Wis. Probable jurisdiction noted. Reported below: 90 Wis. 2d 700, 281 N. W. 2d 94.

No. 79–565. CENTRAL HUDSON GAS & ELECTRIC CORP. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. Appeal from Ct. App. N. Y. Probable jurisdiction noted and case set for oral argument in tandem with No. 79–134, *Consolidated Edison Company of New York, Inc.* v. *Public Service Commission of New York* [probable jurisdiction noted, *ante*, p. 822]. Reported below: 47 N. Y. 2d 94, 390 N. E. 2d 749.

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. QUERN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. Appeals from D. C. N. D. Ill. Motions of Legal Defense Fund for Unborn Children and Cora McRae et al. for leave to file briefs as *amici curiae* denied. Motion of Alan Ernest for appointment as counsel for children unborn and born alive denied. Further consideration of question of jurisdiction postponed to hearing of cases on the merits. Cases consolidated and a total of one and one-half hours allotted for oral argument. Reported below: 469 F. Supp. 1212.

Certiorari Granted

No. 79–116. THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 598 F. 2d 617.

No. 79–305. UNITED STATES *v.* HAVENS. C. A. 5th Cir. Certiorari granted. Reported below: 592 F. 2d 848.

No. 79–465. NAVARRO SAVINGS ASSN. *v.* LEE ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 597 F. 2d 421.

No. 79–48. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO. C. A. 10th Cir. Motion of Arctic Slope Regional Corp. for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 591 F. 2d 554.

No. 78–6885. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted.

Certiorari Denied. (See also Nos. 79–513, 79–549, and 79–5374, *supra.*)

No. 79–162. PENNSYLVANIA NATIONAL MUTUAL CASUALTY CO. *v.* SPENCE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 591 F. 2d 985.

No. 79–207. ALBERT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 283.

No. 79–229. CASTRO ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 674.

No. 79–239. BOWEN, GOVERNOR OF INDIANA, ET AL. *v.* INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS, INC. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 2d 667.

No. 79–291. GRISSOM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–300. INSPIRATION ENTERPRISES, INC., ET AL. *v.* INLAND CREDIT CORP. ET AL. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 69 App. Div. 2d 1024, 415 N. Y. S. 2d 914.

No. 79–307. STRICKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1112.

No. 79–315. WHITE MOUNTAIN BROADCASTING CO., INC. *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 355, 598 F. 2d 274.

No. 79–351. PINE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 219.

No. 79–321. LACLEDE GAS CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied.

No. 79–367. RAPPAPORT *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 308, 391 N. E. 2d 1284.

No. 79–392. MORRIS ET AL. *v.* MCCADDIN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 615.

No. 79–407. WAGNER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–410. SCHANBARGER *v.* MARINE MIDLAND BANK, EXECUTOR. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 415 N. Y. S. 2d 914.

No. 79–412. RUST *v.* JOHNSON ET AL.; and
No. 79–416. CITY OF LOS ANGELES *v.* JOHNSON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 174.

No. 79–420. RICHEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1253.

No. 79–457. PATTERSON ET AL. *v.* UNITED STATES;
No. 79–609. MATASSINI *v.* UNITED STATES;
No. 79–5325. LOPEZ *v.* UNITED STATES;
No. 79–5329. CUESTA *v.* UNITED STATES;
No. 79–5347. TAYLOR *v.* UNITED STATES; and
No. 79–5350. BOWLES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 903.

No. 79–460. SANCHEZ *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 538, 416 N. Y. S. 2d 159.

No. 79–462. HOUDE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 696.

No. 79–483. WHITE *v.* EXCALIBUR INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 50.

No. 79–494. STATISTICAL TABULATING CORP. *v.* HAMISTER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–495. BROCKETT, PROSECUTING ATTORNEY OF SPOKANE COUNTY *v.* SPOKANE ARCADES, INC., ET AL. C. A. 9th Cir. Certiorari before judgment denied.

No. 79–497. WESTON *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. 58, 576 S. W. 2d 705.

No. 79–498. JUPITER INLET CORP. *v.* VILLAGE OF TEQUESTA ET AL. Sup. Ct. Fla. Certiorari denied. Reported below: 371 So. 2d 663.

No. 79–501. MICHAEL *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 1055, 417 N. Y. S. 2d 821.

No. 79–506. CATHODIC PROTECTION SERVICE *v.* AMERICAN SMELTING & REFINING CO. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 594 F. 2d 499.

No. 79–507. BOARD OF TRUSTEES OF PICKENS COUNTY SCHOOL DISTRICT A. ET AL. *v.* MITCHELL. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 582.

No. 79–520. LINFIELD *v.* BOARD OF HIGHER EDUCATION OF THE CITY OF NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 65 App. Div. 2d 734, 410 N. Y. S. 2d 1014.

No. 79–526. BEMIS *v.* CHEVRON RESEARCH CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 910.

No. 79–534. PARRISH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 581 S. W. 2d 560.

No. 79–537. MCDANIEL *v.* PATY ET AL.; and CITIZENS FOR COURT MODERNIZATION, INC. *v.* BLANTON, GOVERNOR OF TENNESEE, ET AL. Ct. App. Tenn. Certiorari denied.

No. 79–541. ALLSTON *v.* GRAYDON. Sup. Ct. S. C. Certiorari denied.

No. 79–545. HOLLOWAY *v.* TIMES MIRROR PRESS CO. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1228.

No. 79–547. DALY *v.* TRAVELERS INSURANCE CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–550. PERALTA FEDERATION OF TEACHERS LOCAL 1603, AMERICAN FEDERATION OF TEACHERS, AFL–CIO, ET AL. *v.* PERALTA COMMUNITY COLLEGE DISTRICT ET AL. Sup. Ct. Cal. Certiorari denied. Reported below: 24 Cal. 3d 369, 595 P. 2d 113.

No. 79–551. BELL *v.* NEW YORK STATE LIQUOR AUTHORITY. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 994.

No. 79–559. BEATTIE *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–562. RANKIN *v.* TEXACO INC. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 79–566. MARTINO ET AL. *v.* MCDONALD'S SYSTEM, INC., ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 598 F. 2d 1079.

No. 79–570. STONER *v.* HUTSON ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 52, 257 S. E. 2d 539.

No. 79–574. OHIO *v.* TATE. Sup. Ct. Ohio. Certiorari denied. Reported below: 59 Ohio St. 2d 50, 391 N. E. 2d 738.

No. 79–578. FLOWERVALE, INC., ET AL. *v.* INLAND CREDIT CORP. ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 69 App. Div. 2d 809, 414 N. Y. S. 2d 1012.

No. 79–588. YORK-HOOVER CORP. ET AL. *v.* UNITED CASKET CO., INC., ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–611. VASILIOS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 387.

No. 79–619. KENNEDY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–637. BARON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 1248.

No. 79–641. BOWMAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–645. MCKINNEY ET AL. *v.* PENNZOIL CO. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 1339.

No. 79–668. CARTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 799.

No. 79–675. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 277.

No. 79–688. BRUNWASSER *v.* CITY OF PITTSBURGH ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 40 Pa. Commw. 197, 396 A. 2d 907.

No. 79–5020. WILLIAMS *v.* GROOMES, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5040. O'SUCH *v.* WOLFF, PRISONS DIRECTOR. Sup. Ct. Nev. Certiorari denied.

No. 79–5048. LACOSTE *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 592 F. 2d 1321.

No. 79–5055. STRAHAN *v.* LOUISIANA. Sup. Ct. La. Certiorari denied.

No. 79–5176. COLE *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: 286 Ore. 411, 595 P. 2d 466.

No. 79–5177. MORALES *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–5196. JOHNSON *v.* MISSOURI. Ct. App. Mo., Southern Dist. Certiorari denied. Reported below: 579 S. W. 2d 771.

No. 79–5216. ABRAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 969.

No. 79–5230. VEGA *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 40 N. C. App. 326, 253 S. E. 2d 94.

No. 79–5234. GOLDFELD *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5243. ESTRADA *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 68 Ill. App. 3d 272, 386 N. E. 2d 128.

No. 79–5257. CARLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–5272. PESCI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1198.

No. 79–5277. MEZA-VILLARELLO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 209.

No. 79–5279. LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 589 F. 2d 980.

No. 79–5284. GOMEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 603 F. 2d 147.

No. 79–5293. SMITH *v.* STEPHENSON, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1205.

No. 79–5296. WILLIAMS *v.* UNITED STATES; and
No. 79–5337. THOMPSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 667.

No. 79–5303. GASKINS *v.* SKARMEAS ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 572.

No. 79–5312. MCDOWELL *v.* CIVILETTI, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5321. LUCATERO-LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–5324. COUNCIL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 591 F. 2d 1337.

No. 79–5349. BOODLE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 398, 391 N. E. 2d 1329.

No. 79–5351. SANITI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 603.

No. 79–5361. REYES-SALAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1053.

No. 79–5365. BENSON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 79–5369. FARRAR *v.* JENKINS, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 600.

No. 79–5371. LAPINSKY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 589.

No. 79–5384. GOOLSBY *v.* MILLER, SECRETARY OF THE TREASURY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 934.

No. 79–5428. PEAK *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 363 So. 2d 1166.

No. 79–5429. REESE *v.* NELSON ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 598 F. 2d 822.

No. 79–5433. COLBERT *v.* MARYLAND. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79–5434. JACKSON *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 562.

No. 79–5437. THOMAS *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 447.

No. 79–5451. BURNEY *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 33, 257 S. E. 2d 543.

No. 79–5454. HENDERSON *v.* ROACH ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–5455. BRUCE *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1051.

No. 79–5456. ORSCANIN *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. Reported below: 283 N. W. 2d 897.

No. 79–5457. GARCIA *v.* HARRIS, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–5459. HOLLEY *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 123 Ariz. 382, 599 P. 2d 835.

No. 79–5466. BUIE *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 297 N. C. 159, 254 S. E. 2d 26.

No. 79–5468. MARNER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 982, 393 N. E. 2d 1036.

No. 79–5479. SECHLER *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5481. MCELROY *v.* WILSON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5484. FORD *v.* BORDENKIRCHER, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–5508. GRIMALDI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 606 F. 2d 332.

No. 79–5531. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79–5538. JOOST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–5539. JACKSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79–5542. CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1237.

No. 79–5543. WARGO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 227.

No. 79–5564. MORALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79–5569. BROWN, AKA DENNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 389.

No. 78–1855. MILHOUSE ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA (TRIGG ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Motions of National Council of the Churches of Christ in the United States of America and Association of United Methodist Theological Schools for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of these motions and this petition.

No. 79–536. DUCKWORTH ET AL. *v.* ADAMS. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 558.

No. 79–200. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* ISLESBORO SCHOOL COMMITTEE ET AL. C. A. 1st Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 593 F. 2d 424.

No. 79–201. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. *v.* JUNIOR COLLEGE DISTRICT OF ST. LOUIS, ST. LOUIS COUNTY, MISSOURI. C. A. 8th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 597 F. 2d 119.

No. 79–442. UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE ET AL. *v.* ROMEO COMMUNITY SCHOOLS ET AL. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 600 F. 2d 581.

No. 79–5469. LARSON *v.* MINNESOTA. Sup. Ct. Minn. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 281 N. W. 2d 481.

No. 79–222. ELLIS *v.* REED, CORRECTIONS SECRETARY, ET AL. C. A. 4th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 596 F. 2d 1195.

No. 79–366. ARGENTINE AIRLINES *v.* ROSS, INDUSTRIAL COMMISSIONER OF NEW YORK. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 64 App. Div. 2d 994, 408 N. Y. S. 2d 831.

No. 79–226. FARE *v.* SCOTT K. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 24 Cal. 3d 395, 595 P. 2d 105.

No. 79–245. UNITED METHODIST CHURCH ET AL. *v.* BARR ET AL. Ct. App. Cal., 4th App. Dist. Motion of Association of United Methodist Theological Schools for leave to file a brief as *amicus curiae* granted. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this motion and petition. Reported below: 90 Cal. App. 3d 259, 153 Cal. Rptr. 322.

No. 79–340. WESTERN SHOSHONE IDENTIFIABLE GROUP, TEMOAK BANDS OF WESTERN SHOSHONE INDIANS, NEVADA *v.* UNITED STATES. Ct. Cl. Motion of Western Shoshone Legal Defense and Education Association et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 219 Ct. Cl. 346 and 361, 593 F. 2d 994.

No. 79–558. PRESBYTERY OF RIVERSIDE ET AL. *v.* COMMUNITY CHURCH OF PALM SPRINGS. Ct. App. Cal., 4th App. Dist. Motion of Lutheran Church in America for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 89 Cal. App. 3d 910, 152 Cal. Rptr. 854.

No. 79–5255. AMADEO *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 627, 255 S. E. 2d 718.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 79–5430. SKIPPER *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Application for stay, addressed to THE CHIEF JUSTICE and referred to the Court, denied. Certiorari denied. Reported below: 598 F. 2d 425.

Rehearing Denied

No. 78–1423. OLITT *v.* MURPHY, JUDGE, ET AL., *ante*, p. 825;

No. 78–1631. BERLIN *v.* NATHAN ET AL., *ante*, p. 828;

No. 78–1642. ST. REGIS PAPER CO. *v.* MARSHALL, SECRETARY OF LABOR, ET AL., *ante*, p. 828;

No. 78–1652. HODDER ET AL. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL., *ante*, p. 829;

No. 78–1674. L. W. BENNETT & SONS, INC. *v.* ANICHINAPEO ET AL., *ante*, p. 830;

No. 78–1764. RYAN *v.* UNITED STATES, *ante*, p. 834;

No. 78–1782. BOWLING *v.* MATHEWS ET AL., *ante*, p. 835;

No. 78–1836. LEWIN *v.* NEW JERSEY, *ante*, p. 905; and

No. 78–1869. REHAHN ET AL. *v.* GENERAL MOTORS CORP. ET AL., *ante*, p. 840. Petitions for rehearing denied.

No. 78–1937. METRO BROADCASTING CO., INC. *v.* SECRETARY OF THE TREASURY OF PUERTO RICO, *ante*, p. 805;

No. 78–1944. STEWART *v.* ATTORNEY GRIEVANCE COMMISSION OF MARYLAND, *ante*, p. 845;

No. 78–6665. PAYNE *v.* CALIFORNIA, *ante*, p. 850;

No. 78–6693. DIXON *v.* UNITED STATES, *ante*, p. 880;

No. 78–6694. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL., *ante*, p. 851;

No. 78–6872. MOONEY *v.* GEORGIA, *ante*, p. 886;

No. 78–6931. PITCHFORD *v.* SUPREME COURT OF ARKANSAS, *ante*, p. 863;

No. 79–22. AIR FREIGHT HAULAGE CO., INC. *v.* RYD-AIR, INC., ET AL., *ante*, p. 864;

No. 79–112. COUNTRYMAN *v.* TEXAS ET AL., *ante*, p. 868;

No. 79–123. RIVERA *v.* CRUZ ET AL., *ante*, p. 868;

No. 79–166. ERNEST *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, *ante*, p. 820;

No. 79–178. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL., *ante*, p. 870;

No. 79–180. SHEEDY *v.* UNITED STATES, *ante*, p. 915;

No. 79–188. ERNEST *v.* SIRICA, U. S. DISTRICT JUDGE, ET AL., *ante*, p. 820;

No. 79–271. BRIDGER *v.* ARKANSAS, *ante*, p. 916;

No. 79–5028. SAYLES *v.* SHUKER, JUDGE, ET AL., *ante*, p. 872;

No. 79–5030. SANDERS ET AL. *v.* HANKINS ET AL., *ante*, p. 872;

No. 79–5059. JACKSON *v.* FLORIDA, *ante*, p. 885;

No. 79–5075. SALVATORE *v.* FLORIDA, *ante*, p. 885;

No. 79–5105. WEAVER *v.* UNITED STATES, *ante*, p. 900;

No. 79–5143. WILLIS *v.* GEORGIA, *ante*, p. 885;

No. 79–5165. POSTELL *v.* TEXAS, *ante*, p. 805;

No. 79–5258. GASKINS *v.* ASHE, SHERIFF, ET AL., *ante*, p. 919; and

No. 79–5341. W. D. *v.* ILLINOIS, *ante*, p. 936. Petitions for rehearing denied.

No. 78–6140. MORGAN *v.* GEORGIA, 441 U. S. 967. Petition for rehearing denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS dissent.

DECEMBER 3, 1979

Appeals Dismissed

No. 79–324. ESTATE OF W. T. GRANT CO. *v.* LEWIS, COMPTROLLER OF FLORIDA, ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 370 So. 2d 764.

No. 79–597. WEBBER ET AL. *v.* CITY OF SACRAMENTO ET AL. Appeal from Sup. Ct. Cal. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 24 Cal. 3d 862, 598 P. 2d 844.

No. 79–623. EISENBERG *v.* EISENBERG. Appeal from Ct. App. Wis. dismissed for want of substantial federal question. Reported below: 90 Wis. 2d 620, 280 N. W. 2d 359.

Certiorari Granted—Vacated and Remanded

No. 79–173. KENTUCKY *v.* WELLS. Ct. App. Ky. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Kentucky* v. *Whorton*, 441 U. S. 786 (1979).

Miscellaneous Orders

No. A–377 (79–121). UNITED STATES *v.* HENRY. C. A. 4th Cir. [Certiorari granted, *ante*, p. 824.] Application for release of respondent pending disposition of the writ of certiorari, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–385 (79–696). COUGHLIN *v.* ALABAMA. Sup. Ct. Ala. Application for stay, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–411 (79–5669). PFISTER *v.* ANDERSON CLINIC, INC., ET AL. C. A. 4th Cir. Application for recall and stay of mandate, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–447. BURLINGTON NORTHERN, INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Application for stay, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied.

No. D–182. IN RE DISBARMENT OF BLONDES. It is ordered that Leonard Saul Blondes, of Silver Spring, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 78–990. UNITED STATES *v.* BAILEY ET AL.; and UNITED STATES *v.* COGDELL. C. A. D. C. Cir. [Certiorari granted, 440 U. S. 957.] Motion of respondents for leave to file supplemental brief after argument granted.

No. 78–1177. WHITE MOUNTAIN APACHE TRIBE ET AL. *v.* BRACKER ET AL. Ct. App. Ariz. [Certiorari granted, *ante*, p. 823.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* granted, and 10 additional minutes allotted for that purpose. Respondents also allotted an additional 10 minutes for oral argument.

No. 78–1522. ANDRUS, SECRETARY OF THE INTERIOR *v.* UTAH. C. A. 10th Cir. [Certiorari granted, 442 U. S. 928.] Motion of the Solicitor General to permit Peter Buscemi, Esquire, to present oral argument *pro hac vice* granted.

No. 78–1604. CENTRAL MACHINERY CO. *v.* ARIZONA STATE TAX COMMISSION. Sup. Ct. Ariz. [Probable jurisdiction noted, *ante*, p. 822.] Motion of the Solicitor General for divided argument granted.

No. 78–1815. ANDRUS, SECRETARY OF THE INTERIOR *v.* SHELL OIL CO. ET AL. C. A. 10th Cir. [Certiorari granted, *ante*, p. 822.] Motion of respondents to require the Solicitor General to file a brief conforming to the petition for certiorari, or, in the alternative, to amend the order of the Court granting the petition, denied.

No. 79–374. BIRMINGHAM TRUST NATIONAL BANK *v.* HARRISON ET AL.; and

No. 79–386. HARRISON *v.* BIRMINGHAM TRUST NATIONAL BANK ET AL. Sup. Ct. Ala. The Solicitor General is invited to file a brief in these cases expressing the views of the United States.

No. 79–5489. CLARK *v.* NEW JERSEY; and

No. 79–5492. DONAHUE *v.* KANSAS. Motions for leave to file petitions for writs of certiorari denied.

No. 79–5493. LEBEDUN *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied.

No. 79–5501. SELLARS *v.* COMMUNITY RELEASE BOARD OF CALIFORNIA ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Certiorari Granted

No. 79–421. BRYANT ET AL. *v.* YELLEN ET AL.;

No. 79–425. CALIFORNIA ET AL. *v.* YELLEN ET AL.; and

No. 79–435. IMPERIAL IRRIGATION DISTRICT ET AL. *v.* YELLEN ET AL. C. A. 9th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 559 F. 2d 509; 595 F. 2d 524 and 525.

No. 79–521. CONSUMER PRODUCT SAFETY COMMISSION ET AL. *v.* GTE SYLVANIA, INC., ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 598 F. 2d 790.

Certiorari Denied. (See also No. 79–597, *supra.*)

No. 79–143. MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 509.

No. 79–209. BENEFIELD *v.* FLORDIA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 351 So. 2d 56.

No. 79–252. LASKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 765.

No. 79–268. GIESE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 1170.

No. 79–272. BROWN ET AL. *v.* TRAUB, JUDGE. Sup. Ct. N. M. Certiorari denied.

No. 79–288. VANCE *v.* BARKSDALE, SHERIFF, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 591.

No. 79–317. SHELL OIL CO. *v.* OLSEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1099.

No. 79–356. ERICKSON *v.* UNITED STATES; and
No. 79–5304. WILSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 296.

No. 79–389. STOUT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 325.

No. 79–403. CRUMPACKER *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION ET AL. Sup. Ct. Ind. Certiorari denied. Reported below: 269 Ind. 630, 383 N. E. 2d 36.

No. 79–418. LINCOLN SCHOOL DISTRICT No. 48 *v.* MARSHALL, SECRETARY OF LABOR. C. A. 8th Cir. Certiorari denied. Reported below: 600 F. 2d 147.

No. 79–423. SMITH *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 597 F. 2d 152.

No. 79–434. JAY NORRIS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 2d Cir. Certiorari denied. Reported below: 598 F. 2d 1244.

No. 79–436. HARAPAT *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied. Reported below: 598 F. 2d 474.

No. 79–463. CITY OF BETHEL, ALASKA, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 594 F. 2d 1301.

No. 79–469. OPPENHEIMER *v.* ELECTRO-NUCLEONICS, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 79–476. MICHIGAN OIL CO. *v.* NATURAL RESOURCES COMMISSION ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 406 Mich. 1, 276 N. W. 2d 141.

No. 79–487. RINALDI *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79–490. PENNSYLVANIA BANK & TRUST CO., EXECUTOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 597 F. 2d 382.

No. 79–576. STEPHENS ET AL. *v.* COLLIER COUNTY BOARD OF COMMISSIONERS, COLLIER COUNTY, FLORIDA. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. Reported below: 366 So. 2d 897.

No. 79–580. COUNTY OF NASSAU *v.* OWENS. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 1242.

No. 79–590. TELEX CORP. ET AL. *v.* BROBECK, PHLEGER & HARRISON. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 866.

No. 79–591. NOVAK *v.* NOVAK. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–605. CASPER, DBA ABBY SALES *v.* METAL TRADES, INC. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 299.

No. 79–607. ADVOCATES FOR THE HANDICAPPED ET AL. *v.* SEARS, ROEBUCK & Co. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 67 Ill. App. 3d 512, 385 N. E. 2d 39.

No. 79–625. BURGUIERES *v.* MORTON-NORWICH PRODUCTS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 1052.

No. 79–636. CROSS *v.* JARVIS, SHERIFF. Sup. Ct. Ga. Certiorari denied.

No. 79–720. VAZQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1269.

No. 79–5104. CLERK *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 68 Ill. App. 3d 1021, 386 N. E. 2d 630.

No. 79–5205. SOUSA *v.* UNITED STATES;

No. 79–5354. DIAMEN, AKA INFANTOLINO *v.* UNITED STATES; and

No. 79–5357. EASTRIDGE *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 400 A. 2d 1036.

No. 79–5225. NASH *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 513.

No. 79–5227. PARKER *v.* OREGON. Ct. App. Ore. Certiorari denied. Reported below: 39 Ore. App. 411, 593 P. 2d 532.

No. 79–5238. SHAKUR *v.* BLANTON, GOVERNOR OF TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 79–5248. BOOTH *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 202 Neb. 692, 276 N. W. 2d 673.

No. 79–5259. ESTRADA *v.* HALVONIK ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5265. WRIGHT *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–5302. KROGER *v.* ENGLE, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied.

No. 79–5314. BENAVIDES *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–5333. THORNTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 79–5367. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 589.

No. 79–5393. PUGLISI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1194.

No. 79–5443. FILLMORE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 483 P. 2d 750.

No. 79–5463. TAYLOR *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 732.

No. 79–5470. WILLIAMS *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHIBILITATION OF FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied.

No. 79–5476. REESE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1085.

No. 79–5486. RIVIERA *v.* HEWITT, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–5488. CAMPOS *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79–5490. PATTERSON *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5496. MCCRARY *v.* LEFEVRE ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5505. CAREY *v.* LEVERETTE, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 745.

No. 79–5509. SINICROPI *v.* NASSAU COUNTY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 60.

No. 79–5510. MARTIN *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 79–5512. JUNKIN *v.* ARIZONA. Ct. App. Ariz. Certiorari denied. Reported below: 123 Ariz. 288, 599 P. 2d 244.

No. 79–5528. PALMER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 584 S. W. 2d 283.

No. 79–5576. YANIS ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 605 F. 2d 1184.

No. 79–5577. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–5585. GUTIERREZ-BARRON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 722.

No. 79–5594. VALDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79–5599. FAISON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–5605. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–313. GORDON *v.* UNITED STATES; and

No. 79–503. FRIEDLANDER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the convictions. Reported below: 605 F. 2d 210.

No. 79–556. MITCHELL ET AL. *v.* BINDRIM; and

No. 79–585. DOUBLEDAY & Co., INC. *v.* BINDRIM. Ct. App. Cal., 2d App. Dist. Motion of Association of American Publishers, Inc., for leave to file a brief as *amicus curiae* in No. 79–585 granted. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 92 Cal. App. 3d 61, 155 Cal. Rptr. 29.

No. 79–627. NEWCOMER *v.* INTERNATIONAL BUSINESS MACHINES CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 598 F. 2d 968.

No. 79–5391. LEGARE *v.* GEORGIA. Sup. Ct. Ga.; and

No. 79–5449. SMITH, AKA MACHETTI *v.* HURLEY, ACTING WARDEN. Super. Ct. Ga., Baldwin County. Certiorari denied. Reported below: No. 79–5391, 243 Ga. 744, 257 S. E. 2d 247.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–6680. McCormick et al. *v.* Texas, *ante*, p. 919;

No. 78–6777. Earvin *v.* Texas, *ante*, p. 919;

No. 78–6805. Steelman *v.* Colorado et al., *ante*, p. 915;

No. 79–34. Stinson *v.* Louisiana State Bar Assn., *ante*, p. 803;

No. 79–76. Black *v.* Payne et al., *ante*, p. 867;

No. 79–295. Pollard *v.* Metropolitan Life Insurance Co., *ante*, p. 917;

No. 79–5031. Hargrave *v.* Florida, *ante*, p. 919;

No. 79–5263. Peeler *v.* Arizona, *ante*, p. 919;

No. 79–5285. Hawk *v.* Oregon, *ante*, p. 921; and

No. 79–5385. Sibley *v.* United States, *ante*, p. 937. Petitions for rehearing denied.

No. 79–5420. Wilson *v.* First Valley Bank, *ante*, p. 945. Petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this petition.

No. 78–6567. LeDuc *v.* Florida, *ante*, p. 885;

No. 78–6671. Begley *v.* Kentucky et al., *ante*, p. 850;

No. 78–6939. Kassima *v.* United States, *ante*, p. 863;

No. 79–5027. Calvin K. et ux. *v.* Commissioner of Internal Revenue, *ante*, p. 872; and

No. 79–5149. Studifin *v.* New York Telephone Co., *ante*, p. 877. Motions for leave to file petitions for rehearing denied.

December 4, 1979

Dismissal Under Rule 60

No. 79–595. Natural Resources Defense Council, Inc., et al. *v.* Long Island Lighting Co. C. A. 2d Cir. Certiorari dismissed before judgment as to petitioner Scientists' Institute for Public Information under this Court's Rule 60.

DECEMBER 5, 1979

Dismissal Under Rule 60

No. 79–470. HUDSON ET AL. *v.* SMITH ET AL. C. A. 6th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 600 F. 2d 60.

DECEMBER 6, 1979

Dismissal Under Rule 60

No. 79–669. DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO. C. A. 5th Cir. Certiorari dismissed as to petitioner Helena Chemical Co. under this Court's Rule 60.

DECEMBER 10, 1979

Appeals Dismissed

No. 79–161. MASQUELETTE *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 579 S. W. 2d 478.

No. 79–302. RANKINS ET AL. *v.* COMMISSION ON PROFESSIONAL COMPETENCE OF THE DUCOR UNION SCHOOL DISTRICT ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question. MR. JUSTICE BRENNAN, MR. JUSTICE BLACKMUN, and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 24 Cal. 3d 167, 593 P. 2d 852.

No. 79–617. SMITH *v.* PENTA ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 81 N. J. 65, 405 A. 2d 350.

No. 79–628. CALIFORNIA ASSOCIATION OF UTILITY SHAREHOLDERS *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Appeal from Sup. Ct. Cal. dismissed for want of substantial federal question.

No. 79–5507. J. K. S. *v.* COLORADO. Appeal from Sup. Ct. Colo. dismissed for want of substantial federal question. Reported below: 198 Colo. 11, 596 P. 2d 747.

No. 79–5545. WHITE *v.* NEW JERSEY. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. Reported below: 81 N. J. 45, 404 A. 2d 1145.

No. 79–5323. APODACA *v.* TEXAS. Appeal from County Ct. at Law No. 2, El Paso County, Tex., dismissed for want of substantial federal question. MR. JUSTICE STEWART would dismiss the appeal for want of a properly presented federal question. MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument.

Certiorari Granted—Vacated and Remanded

No. 77–1543. POWELL *v.* CARGILL, INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *P. C. Pfeiffer Co.* v. *Ford, ante,* p. 69. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 573 F. 2d 561.

No. 78–6153. FERRI *v.* ROSSETTI. Sup. Ct. Pa. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Ferri* v. *Ackerman, ante,* p. 193. Reported below: 483 Pa. 327, 396 A. 2d 1193.

Certiorari Dismissed

No. 78–1933. MONTGOMERY, DBA LAMINATING COMPANY OF COLORADO ET AL. *v.* CENTURY LAMINATING, LTD. C. A. 10th Cir. [Certiorari granted, *ante,* p. 897.] Motion of respondent to dismiss granted. Certiorari dismissed as improvidently granted. Reported below: 595 F. 2d 563.

Miscellaneous Orders

No. A–430. SCHUELLER *v.* LYON MOVING & STORAGE CO. Ct. App. Wash. Application for extension of time in which to file petition for writ of certiorari, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–458. LERMAN *v.* INHABITANTS OF THE CITY OF PORTLAND. Sup. Jud. Ct. Me. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. 78–1418. BLOOMER *v.* LIBERTY MUTUAL INSURANCE CO. C. A. 2d Cir. [Certiorari granted, 441 U. S. 942.] Motion of Hudson Waterways Corp. et al. for leave to file a brief as *amici curiae* denied.

No. 78–1693. UNITED STATES *v.* CLARKE ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 822.] Motion of the Solicitor General for divided argument granted.

No. 78–1793. ROBERTS *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante*, p. 822.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 78–6885. HICKS *v.* OKLAHOMA. Ct. Crim. App. Okla. [Certiorari granted, *ante*, p. 963.] Motion of petitioner for appointment of counsel granted, and it is ordered that David M. Ebel, Esquire, of Denver, Colo., be appointed to serve as counsel for petitioner in this case.

No. 79–539. MAINE *v.* DANA ET AL. Sup. Jud. Ct. Me. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 79–755. LECHT *v.* LEVINSON ET AL; and

No. 79–5653. KIERSTEAD *v.* PRINCI, U. S. MAGISTRATE. Motions for leave to file petitions for writs of habeas corpus denied.

No. 79–97. CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL. Ct. App. Cal., 3d App. Dist. [Certiorari granted, *ante*, p. 824.] Motion of respondent Midcal Aluminum, Inc., for reconsideration of order of November 26, 1979 [*ante*, p. 961], granting divided argument denied. Further consideration of suggestion of mootness of respondent Midcal Aluminum, Inc., is deferred to hearing of case on the merits. MR. JUSTICE BRENNAN took no part in the consideration or decision of these matters.

No. 79–5516. JAFFER *v.* WHITE, CLERK, SUPREME COURT OF FLORIDA. Motion for leave to file petition for writ of mandamus denied.

No. 79–5514. KENNEDY *v.* SHELLINGER, WARDEN, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Certiorari Granted

No. 79–488. GENERAL TELEPHONE COMPANY OF THE NORTHWEST, INC., ET AL. *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 599 F. 2d 322.

No. 79–639. UNITED STATES *v.* SIOUX NATION OF INDIANS ET AL. Ct. Cl. Certiorari granted. Reported below: 220 Ct. Cl. 442, 601 F. 2d 1157.

No. 79–244. UNITED STATES *v.* SALVUCCI ET AL. C. A. 1st Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 79–5146, *Rawlings* v. *Kentucky*, immediately *infra*. Reported below: 599 F. 2d 1094.

No. 79–5146. RAWLINGS *v.* KENTUCKY. Sup. Ct. Ky. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument in tandem with No. 79–244, *United States* v. *Salvucci*, immediately *supra*. Reported below: 581 S. W. 2d 348.

No. 79–616. MOHASCO CORP. *v.* SILVER. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition. Reported below: 602 F. 2d 1083.

No. 79–5175. ADAMS *v.* TEXAS. Ct. Crim. App. Tex. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted limited to the questions presented by the Court:

(1) Is the doctrine of *Witherspoon* v. *Illinois*, 391 U. S. 510, applicable to the bifurcated procedure employed by Texas in capital cases? (2) If so, did the exclusion from jury service in the present case of prospective jurors pursuant to Texas Penal Code § 12.31 (b) violate the doctrine of *Witherspoon* v. *Illinois*, *supra*?

Reported below: 577 S. W. 2d 717.

No. 79–5364. BROWN *v.* LOUISIANA. Sup. Ct. La. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 371 So. 2d 746.

Certiorari Denied. (See also No. 79–161, *supra*.)

No. 78–5855. LEVY *v.* UNITED STATES; and

No. 78–5930. LA FONT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 580 F. 2d 730.

No. 79–169. PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL.; and

No. 79–544. PENNSYLVANIA ELECTRIC CO. ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 130, 600 F. 2d 944.

No. 79–296. BARRENTINE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1069.

No. 79–327. CBS INC. *v.* UNITED STATES ET AL.; and

No. 79–354. COLUMBIA PICTURES INDUSTRIES, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 227.

No. 79–397. PIHAKIS ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1000.

No. 79–479. GENINS *v.* GEIGER ET UX. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 526, 254 S. E. 2d 913.

No. 79–481. HANCOCK ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 558.

No. 79–510. AMERICAN TRUCKING ASSNS., INC. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 266, 602 F. 2d 444.

No. 79–511. BREWSTER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 184, 607 F. 2d 1369.

No. 79–516. INLAND OIL & TRANSPORT CO. *v.* UNITED STATES ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 600 F. 2d 725.

No. 79–523. LEESONA CORP. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 234, 599 F. 2d 958.

No. 79–524. KAYE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 236.

No. 79–525. MOENCKMEIER *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 575.

No. 79–530. TEXAS OIL & GAS CORP. ET AL. *v.* MICHIGAN WISCONSIN PIPE LINE CO. ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 601 F. 2d 1144.

No. 79–553. PARK WEST MANAGEMENT CORP. *v.* MITCHELL ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 47 N. Y. 2d 316, 391 N. E. 2d 1288.

No. 79–618. GOOD HOPE REFINERIES, INC. *v.* BENAVIDES ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 602 F. 2d 998.

No. 79–626. ANCARROW ET UX. *v.* CITY OF RICHMOND. C. A. 4th Cir. Certiorari denied. Reported below: 600 F. 2d 443.

No. 79–630. HUNT ET AL. *v.* COASTAL STATES GAS PRODUCING CO. ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 583 S. W. 2d 322.

No. 79–631. OKLAHOMA *v.* C. M. G. Ct. Crim. App. Okla. Certiorari denied. Reported below: 594 P. 2d 798.

No. 79–642. DOUGHERTY *v.* HAALAND. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 574.

No. 79–689. GAGNE *v.* MEACHUM. C. A. 1st Cir. Certiorari denied. Reported below: 602 F. 2d 471.

No. 79–740. ARTHUR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 660.

No. 79–744. ALBERICO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 604 F. 2d 1315.

No. 79–5039. JOINER *v.* YOUNGBLOOD ET AL. Sup. Ct. La. Certiorari denied. Reported below: 370 So. 2d 586.

No. 79–5268. GILLION *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 256, 390 N. E. 2d 900.

No. 79–5308. GAERTNER *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 90 Wis. 2d 867, 280 N. W. 2d 789.

No. 79–5336. McCONKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79–5353. DRYE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1207.

No. 79–5368. CROWDER *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 371 So. 2d 821.

No. 79–5418. WALDROP *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 730.

No. 79–5426. QURESHI *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. D. C. Cir. Certiorari denied. Reported below: 194 U. S. App. D. C. 400, 600 F. 2d 280.

No. 79–5441. HARRIS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1251.

No. 79–5444. KEEFER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–5450. YOUNG ET AL. *v.* LANDRIEAU, SECRETARY, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 599 F. 2d 870.

No. 79–5460. GREER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1251.

No. 79–5467. MARCUS *v.* INTERNAL REVENUE SERVICE ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 595 F. 2d 1228.

No. 79–5482. GRIZZELL *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied.

No. 79–5504. JOHNSTONE *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 791, 415 N. Y. S. 2d 916.

No. 79–5517. HOWERY *v.* NEW JERSEY. Sup. Ct. N. J. Certiorari denied. Reported below: 80 N. J. 563, 404 A. 2d 632.

No. 79–5524. GERRY ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 23 Wash. App. 166, 595 P. 2d 49.

No. 79–5546. PLATEL *v.* CLARK, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5565. NICKERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 156.

No. 79–5570. DRAKEFORD *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–5573. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.

No. 79–5610. RAIA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1198.

No. 79–5617. BELVIN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–5618. ELSBERY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 1054.

No. 79–5620. CARRA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 604 F. 2d 1271.

No. 79–5621. BRETZ *v.* MONTANA. Sup. Ct. Mont. Certiorari denied.

No. 79–5631. PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 553.

No. 79–5634. VAN DYKE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 220.

No. 79–5635. YOUNG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 642.

No. 79–5644. JANKOWSKI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 504.

No. 78–6687. RUFFIN *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 243 Ga. 95, 252 S. E. 2d 472.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 79–461. WATERBURY URBAN RENEWAL AGENCY *v.* WATERBURY ACTION TO CONSERVE OUR HERITAGE, INC., ET AL. C. A. 2d Cir. Motion of Connecticut Community Development Association for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 603 F. 2d 310.

No. 79–475. JICARILLA APACHE TRIBE *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 601 F. 2d 1116.

No. 79–478. ALMA SOCIETY, INC., ET AL. *v.* MELLON ET AL. C. A. 2d Cir. Motion of counsel for respondent natural parents who have surrendered their children for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 601 F. 2d 1225.

No. 79–632. SMITH, CORRECTIONAL SUPERINTENDENT *v.* GRAHAM. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 602 F. 2d 1078.

No. 79–640. GOLDBERG, TRUSTEE, ET AL. *v.* KIRSHNER. C. A. 2d Cir. Motion of Merrill Lynch, Pierce, Fenner & Smith, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 603 F. 2d 234.

No. 79–643. COMMISSIONER OF INTERNAL REVENUE *v.* QUINLIVAN ET AL. C. A. 8th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL would grant certiorari. MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 599 F. 2d 269.

No. 79–663. FRIAS *v.* BOARD OF TRUSTEES OF ECTOR COUNTY INDEPENDENT SCHOOL DISTRICT ET AL. Ct. Civ. App. Tex., 8th Sup. Jud. Dist. Motion of respondent Board of Trustees of Ector County Independent School District for damages and certiorari denied. Reported below: 584 S. W. 2d 944.

Rehearing Denied

No. 78–6936. SCOTT *v.* GEORGIA, *ante*, p. 925. Petition for rehearing denied.

No. 78–1692. SOLOMON *v.* WEST VIRGINIA, *ante*, p. 831. Motion for leave to proceed further herein *in forma pauperis* granted. Petition for rehearing denied.

No. 78–6677. FIGUEROA *v.* LEFEVRE, CORRECTIONAL SUPERINTENDENT, *ante*, p. 850;

No. 79–5095. DAVIS *v.* BRYAN, U. S. DISTRICT JUDGE, *ante*, p. 821; and

No. 79–5181. DAVIS *v.* RUSSELL ET AL., U. S. CIRCUIT JUDGES, *ante*, p. 821. Motions for leave to file petitions for rehearing denied.

DECEMBER 13, 1979

Certiorari Granted—Vacated and Remanded

No. 79–856. GOLDWATER ET AL. *v.* CARTER, PRESIDENT OF THE UNITED STATES, ET AL. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded with directions to dismiss the complaint. MR. JUSTICE MARSHALL concurs in the result. MR. JUSTICE POWELL concurs in the judgment

and filed a statement. MR. JUSTICE REHNQUIST concurs in the judgment and filed a statement in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN join in the grant of the petition for writ of certiorari but would set the case for argument and give it plenary consideration. MR. JUSTICE BLACKMUN filed a statement in which MR. JUSTICE WHITE joins. MR. JUSTICE BRENNAN would grant the petition for writ of certiorari and affirm the judgment of the Court of Appeals and filed a statement. Reported below: 199 U. S. App. D. C. 115, 617 F. 2d 697.

MR. JUSTICE POWELL, concurring in the judgment.

Although I agree with the result reached by the Court, I would dismiss the complaint as not ripe for judicial review.

I

This Court has recognized that an issue should not be decided if it is not ripe for judicial review. *Buckley* v. *Valeo*, 424 U. S. 1, 113–114 (1976) (*per curiam*). Prudential considerations persuade me that a dispute between Congress and the President is not ready for judicial review unless and until each branch has taken action asserting its constitutional authority. Differences between the President and the Congress are commonplace under our system. The differences should, and almost invariably do, turn on political rather than legal considerations. The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse. Otherwise, we would encourage small groups or even individual Members of Congress to seek judicial resolution of issues before the normal political process has the opportunity to resolve the conflict.

In this case, a few Members of Congress claim that the President's action in terminating the treaty with Taiwan has deprived them of their constitutional role with respect to

a change in the supreme law of the land. Congress has taken no official action. In the present posture of this case, we do not know whether there ever will be an actual confrontation between the Legislative and Executive Branches. Although the Senate has considered a resolution declaring that Senate approval is necessary for the termination of any mutual defense treaty, see 125 Cong. Rec. 13672, 13695–13697 (1979), no final vote has been taken on the resolution. See *id.*, at 32522–32531. Moreover, it is unclear whether the resolution would have retroactive effect. See *id.*, at 13711–13721; *id.*, at 15210. It cannot be said that either the Senate or the House has rejected the President's claim. If the Congress chooses not to confront the President, it is not our task to do so. I therefore concur in the dismissal of this case.

II

MR. JUSTICE REHNQUIST suggests, however, that the issue presented by this case is a nonjusticiable political question which can never be considered by this Court. I cannot agree. In my view, reliance upon the political-question doctrine is inconsistent with our precedents. As set forth in the seminal case of *Baker* v. *Carr*, 369 U. S. 186, 217 (1962), the doctrine incorporates three inquiries: (i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention? In my opinion the answer to each of these inquiries would require us to decide this case if it were ready for review.

First, the existence of "a textually demonstrable constitutional commitment of the issue to a coordinate political department," *ibid.*, turns on an examination of the constitutional provisions governing the exercise of the power in question.

Powell v. *McCormack*, 395 U. S. 486, 519 (1969). No constitutional provision explicitly confers upon the President the power to terminate treaties. Further, Art. II, § 2, of the Constitution authorizes the President to make treaties with the advice and consent of the Senate. Article VI provides that treaties shall be a part of the supreme law of the land. These provisions add support to the view that the text of the Constitution does not unquestionably commit the power to terminate treaties to the President alone. Cf. *Gilligan* v. *Morgan*, 413 U. S. 1, 6 (1973); *Luther* v. *Borden*, 7 How. 1, 42 (1849).

Second, there is no "lack of judicially discoverable and manageable standards for resolving" this case; nor is a decision impossible "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker* v. *Carr*, *supra*, at 217. We are asked to decide whether the President may terminate a treaty under the Constitution without congressional approval. Resolution of the question may not be easy, but it only requires us to apply normal principles of interpretation to the constitutional provisions at issue. See *Powell* v. *McCormack*, *supra*, at 548–549. The present case involves neither review of the President's activities as Commander in Chief nor impermissible interference in the field of foreign affairs. Such a case would arise if we were asked to decide, for example, whether a treaty required the President to order troops into a foreign country. But "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker* v. *Carr*, *supra*, at 211. This case "touches" foreign relations, but the question presented to us concerns only the constitutional division of power between Congress and the President.

A simple hypothetical demonstrates the confusion that I find inherent in MR. JUSTICE REHNQUIST's opinion concurring in the judgment. Assume that the President signed a mutual defense treaty with a foreign country and announced that it

would go into effect despite its rejection by the Senate. Under MR. JUSTICE REHNQUIST's analysis that situation would present a political question even though Art. II, § 2, clearly would resolve the dispute. Although the answer to the hypothetical case seems self-evident because it demands textual rather than interstitial analysis, the nature of the legal issue presented is no different from the issue presented in the case before us. In both cases, the Court would interpret the Constitution to decide whether congressional approval is necessary to give a Presidential decision on the validity of a treaty the force of law. Such an inquiry demands no special competence or information beyond the reach of the Judiciary. Cf. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U. S. 103, 111 (1948).[1]

Finally, the political-question doctrine rests in part on prudential concerns calling for mutual respect among the three branches of Government. Thus, the Judicial Branch should avoid "the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question." Similarly, the doctrine restrains judicial action where there is an "unusual need for unquestioning adherence to a political decision already made." *Baker* v. *Carr*, *supra*, at 217.

If this case were ripe for judicial review, see Part I, *supra*, none of these prudential considerations would be present.

[1] The Court has recognized that, in the area of foreign policy, Congress may leave the President with wide discretion that otherwise might run afoul of the nondelegation doctrine. *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304 (1936). As stated in that case, "the President alone has the power to speak or listen as a representative of the Nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates." *Id.*, at 319 (emphasis in original). Resolution of this case would interfere with neither the President's ability to negotiate treaties nor his duty to execute their provisions. We are merely being asked to decide whether a treaty, which cannot be ratified without Senate approval, continues in effect until the Senate or perhaps the Congress takes further action.

Interpretation of the Constitution does not imply lack of respect for a coordinate branch. *Powell* v. *McCormack, supra,* at 548. If the President and the Congress had reached irreconcilable positions, final disposition of the question presented by this case would eliminate, rather than create, multiple constitutional interpretations. The specter of the Federal Government brought to a halt because of the mutual intransigence of the President and the Congress would require this Court to provide a resolution pursuant to our duty " 'to say what the law is.' " *United States* v. *Nixon,* 418 U. S. 683, 703 (1974), quoting *Marbury* v. *Madison,* 1 Cranch 137, 177 (1803).

III

In my view, the suggestion that this case presents a political question is incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another. See *Buckley* v. *Valeo,* 424 U. S., at 138; *United States* v. *Nixon, supra,* at 707; *The Pocket Veto Case,* 279 U. S. 655, 676–678 (1929); *Myers* v. *United States,* 272 U. S. 52 (1926).[2] Under the

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[2] *Coleman* v. *Miller,* 307 U. S. 433 (1939), is not relevant here. In that case, the Court was asked to review the legitimacy of a State's ratification of a constitutional amendment. Four Members of the Court stated that Congress has exclusive power over the ratification process. *Id.,* at 456–460 (Black, J., concurring, joined by Roberts, Frankfurter, and Douglas, JJ.). Three Members of the Court concluded more narrowly that the Court could not pass upon the efficacy of state ratification. They also found no standards by which the Court could fix a reasonable time for the ratification of a proposed amendment. *Id.,* at 452–454.

The proposed constitutional amendment at issue in *Coleman* would have overruled decisions of this Court. Compare *id.,* at 435, n. 1, with *Child Labor Tax Case,* 259 U. S. 20 (1922); *Hammer* v. *Dagenhart,* 247 U. S. 251 (1918). Thus, judicial review of the legitimacy of a State's ratification would have compelled this Court to oversee the very constitutional process used to reverse Supreme Court decisions. In such circumstances it may be entirely appropriate for the Judicial Branch of Government to step aside. See Scharpf, Judicial Review and The Political

criteria enunciated in *Baker* v. *Carr*, we have the responsibility to decide whether both the Executive and Legislative Branches have constitutional roles to play in termination of a treaty. If the Congress, by appropriate formal action, had challenged the President's authority to terminate the treaty with Taiwan, the resulting uncertainty could have serious consequences for our country. In that situation, it would be the duty of this Court to resolve the issue.

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE STEVENS join, concurring in the judgment.

I am of the view that the basic question presented by the petitioners in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President. In *Coleman* v. *Miller*, 307 U. S. 433 (1939), a case in which members of the Kansas Legislature brought an action attacking a vote of the State Senate in favor of the ratification of the Child Labor Amendment, Mr. Chief Justice Hughes wrote in what is referred to as the "Opinion of the Court":

> "We think that . . . the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the Amendment.
>
> "The precise question as now raised is whether, when the legislature of the State, as we have found, has actually ratified the proposed amendment, the Court should

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Question: A Functional Analysis, 75 Yale L. J. 517, 589 (1966). The present case involves no similar principle of judicial nonintervention.

> restrain the state officers from certifying the ratification to the Secretary of State, because of an earlier rejection, and thus prevent the question from coming before the political departments. We find no basis in either Constitution or statute for such judicial action. Article V, speaking solely of ratification, contains no provision as to rejection. . . ." *Id.*, at 450.

Thus, Mr. Chief Justice Hughes' opinion concluded that "Congress in controlling the promulgation of the adoption of a constitutional amendment has the final determination of the question whether by lapse of time its proposal of the amendment had lost its vitality prior to the required ratifications." *Id.*, at 456.

I believe it follows *a fortiori* from *Coleman* that the controversy in the instant case is a nonjusticiable political dispute that should be left for resolution by the Executive and Legislative Branches of the Government. Here, while the Constitution is express as to the manner in which the Senate shall participate in the ratification of a treaty, it is silent as to that body's participation in the abrogation of a treaty. In this respect the case is directly analogous to *Coleman, supra.* As stated in *Dyer* v. *Blair,* 390 F. Supp. 1291, 1302 (ND Ill. 1975) (three-judge court):

> "A question that might be answered in different ways for different amendments must surely be controlled by political standards rather than standards easily characterized as judicially manageable."

In light of the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties (see, *e. g.*, n. 1, *infra*), the instant case in my view also "must surely be controlled by political standards."

I think that the justifications for concluding that the question here is political in nature are even more compelling than in *Coleman* because it involves foreign relations—specifically

a treaty commitment to use military force in the defense of a foreign government if attacked. In *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304 (1936), this Court said:

> "Whether, if the Joint Resolution had related solely to internal affairs it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . . ." *Id.*, at 315.

The present case differs in several important respects from *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), cited by petitioners as authority both for reaching the merits of this dispute and for reversing the Court of Appeals. In *Youngstown*, private litigants brought a suit contesting the President's authority under his war powers to seize the Nation's steel industry, an action of profound and demonstrable domestic impact. Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.[1] Moreover, as in *Curtiss-Wright*, the

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[1] As observed by Chief Judge Wright in his concurring opinion below:

"Congress has initiated the termination of treaties by directing or requiring the President to give notice of termination, without any prior presidential request. Congress has annulled treaties without any presidential notice. It has conferred on the President the power to terminate a particular treaty, and it has enacted statutes practically nullifying the domestic effects of a treaty and thus caused the President to carry out termination. . . .

"Moreover, Congress has a variety of powerful tools for influencing foreign policy decisions that bear on treaty matters. Under Article I, Section 8 of the Constitution, it can regulate commerce with foreign nations, raise and support armies, and declare war. It has power over the appointment of ambassadors and the funding of embassies and consulates.

effect of this action, as far as we can tell, is "entirely external to the United States, and [falls] within the category of foreign affairs." Finally, as already noted, the situation presented here is closely akin to that presented in *Coleman*, where the Constitution spoke only to the procedure for ratification of an amendment, not to its rejection.

Having decided that the question presented in this action is nonjusticiable, I believe that the appropriate disposition is for this Court to vacate the decision of the Court of Appeals and remand with instructions for the District Court to dismiss the complaint. This procedure derives support from our practice in disposing of moot actions in federal courts.[2] For more than 30 years, we have instructed lower courts to vacate any decision on the merits of an action that has become moot prior to a resolution of the case in this Court. *United States* v. *Munsingwear, Inc.*, 340 U. S. 36 (1950). The Court has required such decisions to be vacated in order to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *Id.*, at 41. It is even more imperative that this Court invoke this procedure to ensure that resolution of a "political question," which should not have been decided by a lower court, does not "spawn any legal consequences." An Art. III court's resolution of a question that is "political" in character can create far more dis-

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Congress thus retains a strong influence over the President's conduct in treaty matters.

"As our political history demonstrates, treaty creation and termination are complex phenomena rooted in the dynamic relationship between the two political branches of our government. We thus should decline the invitation to set in concrete a particular constitutionally acceptable arrangement by which the President and Congress are to share treaty termination." App. to Pet. for Cert. 44A–45A (footnotes omitted).

[2] This Court, of course, may not prohibit state courts from deciding political questions, any more than it may prohibit them from deciding questions that are moot, *Doremus* v. *Board of Education*, 342 U. S. 429, 434 (1952), so long as they do not trench upon exclusively federal questions of foreign policy. *Zschernig* v. *Miller*, 389 U. S. 429, 441 (1968).

ruption among the three coequal branches of Government than the resolution of a question presented in a moot controversy. Since the political nature of the questions presented should have precluded the lower courts from considering or deciding the merits of the controversy, the prior proceedings in the federal courts must be vacated, and the complaint dismissed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE WHITE joins, dissenting in part.

In my view, the time factor and its importance are illusory; if the President does not have the power to terminate the treaty (a substantial issue that we should address only after briefing and oral argument), the notice of intention to terminate surely has no legal effect. It is also indefensible, without further study, to pass on the issue of justiciability or on the issues of standing or ripeness. While I therefore join in the grant of the petition for certiorari, I would set the case for oral argument and give it the plenary consideration it so obviously deserves.

MR. JUSTICE BRENNAN, dissenting.

I respectfully dissent from the order directing the District Court to dismiss this case, and would affirm the judgment of the Court of Appeals insofar as it rests upon the President's well-established authority to recognize, and withdraw recognition from, foreign governments. App. to Pet. for Cert. 27A–29A.

In stating that this case presents a nonjusticiable "political question," MR. JUSTICE REHNQUIST, in my view, profoundly misapprehends the political-question principle as it applies to matters of foreign relations. Properly understood, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been "constitutional[ly] commit[ted]." *Baker* v. *Carr*, 369 U. S.

186, 211–213, 217 (1962). But the doctrine does not pertain when a court is faced with the *antecedent* question whether a particular branch has been constitutionally designated as the repository of political decisionmaking power. Cf. *Powell* v. *McCormack*, 395 U. S. 486, 519–521 (1969). The issue of decisionmaking authority must be resolved as a matter of constitutional law, not political discretion; accordingly, it falls within the competence of the courts.

The constitutional question raised here is prudently answered in narrow terms. Abrogation of the defense treaty with Taiwan was a necessary incident to Executive recognition of the Peking Government, because the defense treaty was predicated upon the now-abandoned view that the Taiwan Government was the only legitimate political authority in China. Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 410 (1964); *Baker* v. *Carr*, *supra*, at 212; *United States* v. *Pink*, 315 U. S. 203, 228–230 (1942). That mandate being clear, our judicial inquiry into the treaty rupture can go no further. See *Baker* v. *Carr*, *supra*, at 212; *United States* v. *Pink*, *supra*, at 229.

JANUARY 7, 1980

Affirmed on Appeal

No. 79–704. SLATE *v.* NOLL. Affirmed on appeal from D. C. W. D. Wis. MR. JUSTICE MARSHALL would note probable jurisdiction and set case for oral argument. Reported below: 474 F. Supp. 882.

Appeals Dismissed

No. 79–409. CAHILL *v.* GOVERNMENTAL ETHICS COMMISSION. Appeal from Sup. Ct. Kan. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 225 Kan. 772, 594 P. 2d 1103.

No. 79–270. HEADS *v.* LOUISIANA. Appeal from Sup. Ct. La. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari granted, judgment vacated, and case remanded for further consideration in light of *Sandstrom* v. *Montana*, 442 U. S. 510 (1979). Reported below: 370 So. 2d 564.

No. 79–665. PICKERING *v.* COMMISSIONER OF INTERNAL REVENUE. Appeal from C. A. 2d Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–699. HEYNE *v.* HEYNE ET AL. Appeal from Ct. App. Ohio, Summit County, dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–413. CRAWFORD *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of a properly presented federal question. Reported below: 47 N. Y. 2d 884, 393 N. E. 2d 488.

No. 79–5411. SAMMONS *v.* OHIO. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. Reported below: 58 Ohio St. 2d 460, 391 N. E. 2d 713.

Certiorari Granted—Vacated and Remanded. (See No. 79–270, *supra.*)

Certiorari Granted—Reversed. (See Nos. 79–168, 79–181, and 79–184, *ante*, p. 223.)

Miscellaneous Orders

No. A–154. STEPPE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. D. C. N. D. Fla. Application for bail, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–465 (79–5777). HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT. Sup. Ct. Nev. Application for an extension of time to docket appeal, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. A–507. SAYLES *v.* HART, U. S. DISTRICT JUDGE. C. A. D. C. Cir. Application for injunction, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied.

No. D–177. IN RE DISBARMENT OF PANEK. Disbarment entered. [For earlier order herein, see *ante*, p. 912.]

No. 8, Orig. ARIZONA *v.* CALIFORNIA ET AL. Memorandum and Report of the Special Master on preliminary issues received and ordered filed. Motion of Arizona et al. for leave to file exceptions to the Memorandum and Report of the Special Master denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these matters. [For earlier order herein, see, *e. g.*, 440 U. S. 942.]

No. 78–1557. NACHMAN CORP. *v.* PENSION BENEFIT GUARANTY CORPORATION ET AL. C. A. 7th Cir. [Certiorari granted, 442 U. S. 940.] Motion of respondent union for divided argument granted.

No. 78–1577. SEARS, ROEBUCK & CO. *v.* COUNTY OF LOS ANGELES ET AL. Ct. App. Cal., 2d App. Dist. [Certiorari granted, *ante*, p. 823.] Motion of petitioner for divided argument granted. MR. JUSTICE STEWART took no part in the consideration or decision of this motion.

No. 78–1870. WHIRLPOOL CORP. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 6th Cir. [Certiorari granted, *ante*, p 823.] Motions of Philadelphia Area Project on Occupational Safety & Health, American Public Health Association, and American Federation of Labor & Congress of Industrial Organizations et al. for leave to file briefs as *amici curiae* granted.

No. 78–1595. LEWIS *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 442 U. S. 939.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–97. CALIFORNIA RETAIL LIQUOR DEALERS ASSN. *v.* MIDCAL ALUMINUM, INC., ET AL. Ct. App. Cal., 3d App. Dist. [Certiorari granted, *ante*, p. 824.] Motion of Consumers Union of the United States, Inc., for leave to file a brief as *amicus curiae* granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this motion.

No. 79–584. RESEARCH EQUITY FUND, INC. *v.* INSURANCE COMPANY OF NORTH AMERICA. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

No. 79–621. ARIZONA *v.* MANYPENNY. C. A. 9th Cir.; and

No. 79–664. VENTURA COUNTY *v.* GULF OIL CORP. C. A. 9th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–5114. WARREN *v.* MISSISSIPPI, *ante*, p. 956. Respondent requested to file a response to petition for rehearing within 30 days.

No. 79–5604. LOCKETT *v.* BLACKBURN, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 79–676. CHILDS *v.* APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT, ET AL.;

No. 79–5547. WATKINS *v.* MARTIN, WARDEN, ET AL.;

No. 79–5554. WILLIAMS *v.* UNITED STATES; and

No. 79–5598. FERRANTE *v.* BRANWELL, U. S. DISTRICT JUDGE. Motions for leave to file petitions for writs of mandamus denied.

No. 79–5686. BARR *v.* PHELPS, CORRECTIONS SECRETARY. Motion for leave to file petition for writ of habeas corpus denied.

No. 79–681. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. Motion of petitioner to strike memorandum for federal respondents in opposition denied. Motion for leave to file petition for writ of mandamus denied.

No. 79–5667. PAUL *v.* STAFFORD, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

No. 79–5609. BOTTOS *v.* PIVARNICK ET AL. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted

No. 79–343. SUN SHIP, INC. *v.* PENNSYLVANIA ET AL. Appeal from Pa. Commw. Ct. Probable jurisdiction noted. Reported below: 41 Pa. Commw. 302, 398 A. 2d 1111.

No. 79–602. AGINS ET UX. *v.* CITY OF TIBURON. Appeal from Sup. Ct. Cal. Probable jurisdiction noted. Reported below: 24 Cal. 3d 266, 598 P. 2d 25.

No. 79–703. CAREY, STATE'S ATTORNEY OF COOK COUNTY *v.* BROWN ET AL. Appeal from C. A. 7th Cir. Probable jurisdiction noted. Reported below: 602 F. 2d 791.

Certiorari Granted

No. 79–383. STANDEFER *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 610 F. 2d 1076.

No. 79–672. NATIONAL LABOR RELATIONS BOARD *v.* RETAIL STORE EMPLOYEES UNION, LOCAL 1001, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 194 U. S. App. D. C. 400, 600 F. 2d 280 and 201 U. S. App. D. C. 147, 627 F. 2d 1133.

No. 79–701. ROADWAY EXPRESS, INC. *v.* MONK ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 599 F. 2d 1378.

No. 79–669. DAWSON CHEMICAL CO. ET AL. *v.* ROHM & HAAS CO. C. A. 5th Cir. Motions of American Rice Growers Exchange and Pesticide Producers Association for leave to file briefs as *amici curiae* and certiorari granted. Reported below: 599 F. 2d 685.

No. 79–5499. SKIPPER *v.* BRUMMER ET AL. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 598 F. 2d 427.

Certiorari Denied. (See also Nos. 79–409, 79–665, and 79–699, *supra.*)

No. 79–73. ADELAIDE SHIPPING LINES, LTD., ET AL. *v.* SUNKIST GROWERS, INC. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 1327.

No. 79–142. WELLS FARGO BANK, N. A., ET AL. *v.* GARFINKLE ET VIR. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–320. HALL *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 66 Ill. App. 3d 891, 384 N. E. 2d 578.

No. 79–338. CASKEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 325, 256 S. E. 2d 737.

No. 79–341. FIRSTENBERG *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 92 Cal. App. 3d 570, 155 Cal. Rptr. 80.

No. 79–352. DELAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 173.

No. 79–391. LUKEFAHR ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1086.

No. 79–396. ROSE ET AL. *v.* BRADLEY, MAYOR OF LOS ANGELES, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–400. GEORGIA ET AL. *v.* FREEMAN. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 65.

No. 79–429. LUCKY STORES, INC. *v.* VILLAGE OF LOMBARD. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 598.

No. 79–432. EL CAMINO COMMUNITY COLLEGE DISTRICT ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1258.

No. 79–449. TURCIO *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 178 Conn. 116, 422 A. 2d 749.

No. 79–464. OSTROW *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 1370.

No. 79–477. FIRST STATE BANK OF HUDSON COUNTY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 558.

No. 79–508. AMOCO PRODUCTION CO. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 370.

No. 79–515. AMERICAN SECURITY COUNCIL EDUCATION FOUNDATION *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 197 U. S. App. D. C. 124, 607 F. 2d 438.

No. 79–518. TERKEL *v.* WEBSTER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 214.

No. 79–535. LAMPKIN-ASAM *v.* SUPREME COURT OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 760.

No. 79–560. VISLISEL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1209.

No. 79–563. LIOSI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79–564. INDIANA & MICHIGAN ELECTRIC CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 185.

No. 79–575. RICHARDSON ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 290.

No. 79–577. DAMERON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–582. COLORADO ET AL. *v.* VETERANS' ADMINISTRATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 602 F. 2d 926.

No. 79–586. KRAYNAK ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 604 F. 2d 231.

No. 79–589. LULL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 1166.

No. 79–592. LARIMER COUNTY DEPARTMENT OF SOCIAL SERVICES ET AL. *v.* KANE, U. S. DISTRICT JUDGE, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–599. RIZZO *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied.

No. 79–600. SARMIENTO ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 304.

No. 79–604. MOUNTAIN FUEL SUPPLY CO. ET AL. *v.* UTAH COMMITTEE OF CONSUMER SERVICES ET AL. Sup. Ct. Utah. Certiorari denied. Reported below: 595 P. 2d 871.

No. 79–612. RUNCK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 968.

No. 79–614. STOUDT'S FERRY PREPARATION CO. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 589.

No. 79–615. BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF CINCINNATI ET AL. *v.* WALTER, SUPERINTENDENT OF PUBLIC INSTRUCTION, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 58 Ohio St. 2d 368, 390 N. E. 2d 813.

No. 79–635. DEUTSCH *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 44.

No. 79–638. POE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

No. 79–644. ATELIERS ROANNAIS DE CONSTRUCTIONS TEXTILES ET AL. *v.* DUPLAN CORP. ET AL.;

No. 79–658. DEERING MILLIKEN RESEARCH CORP. ET AL. *v.* DUPLAN CORP. ET AL.;

No. 79–659. DEERING MILLIKEN, INC. *v.* DUPLAN CORP. ET AL.; and

No. 79–660. DUPLAN CORP. ET AL. *v.* DEERING MILLIKEN, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 594 F. 2d 979.

No. 79–648. WOOLSEY *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP.; and

No. 79–712. ASH ET UX. *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 1274.

No. 79–649. AVCOLLIE *v.* CONNECTICUT. Sup. Ct. Conn. Certiorari denied. Reported below: 178 Conn. 450, 423 A. 2d 118.

No. 79–651. AMES ET UX. *v.* MCCARTY ET AL. Ct. App. N. M. Certiorari denied.

No. 79–652. NATIONAL BANCSHARES CORPORATION OF TEXAS ET AL. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL.; and

No. 79–653. REIDY INTERNATIONAL, INC. *v.* BULLOCK, COMPTROLLER OF PUBLIC ACCOUNTS OF TEXAS, ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 584 S. W. 2d 268.

No. 79–655. J. B. K., INC., ET AL. *v.* CARON ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 600 F. 2d 710.

No. 79–657. AD HOC COMMITTEE TO INVESTIGATE THE FEDERAL GRAND JURY *v.* KOCH, ASSISTANT UNITED STATES ATTORNEY. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1192.

No. 79–670. CRANE *v.* ILLINOIS INDUSTRIAL COMMISSION ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 596.

No. 79–671. TURNER ET AL. *v.* MARION COUNTY, TEXAS. Ct. Civ. App. Tex., 6th Sup. Jud. Dist. Certiorari denied.

No. 79–680. OLSEN *v.* GUAM. C. A. 9th Cir. Certiorari denied.

No. 79–682. KONCZAK ET UX. *v.* TYRRELL, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 13.

No. 79–684. VISION CENTER *v.* OPTICKS, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 111.

No. 79–690. MAGBY *v.* MORAN, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 562.

No. 79–694. GUNTHARP *v.* PLANTERS OIL MILL. Sup. Ct. Miss. Certiorari denied. Reported below: 372 So. 2d 1274.

No. 79–696. COUGHLIN *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 374 So. 2d 291.

No. 79–702. EKAS ET AL. *v.* CARLING NATIONAL BREWERIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 664.

No. 79–709. LOCAL 520, INTERNATIONAL UNION OF OPERATING ENGINEERS, ET AL. *v.* JONES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 664.

No. 79–714. MARTY'S FLOOR COVERING CO., INC. *v.* GAF CORP. C. A. 4th Cir. Certiorari denied. Reported below: 604 F. 2d 266.

No. 79–715. NATIONAL STUDENT FILM CORP. *v.* FENSTER SCHOOL. Ct. App. Ariz. Certiorari denied.

No. 79–716. ABBEY *v.* CONTROL DATA CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 724.

No. 79–717. FRISTOE *v.* REYNOLDS METALS CO. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 223.

No. 79–719. THOMPSON ET UX. *v.* PEOPLES LIBERTY BANK ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–722. JACKSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 266 Ark. 754, 585 S. W. 2d 367.

No. 79–727. RENTSCHLER *v.* FREEMAN ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–728. STAR SHIPPING A/S ET AL. *v.* PACIFIC LUMBER & SHIPPING CO., INC., ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–733. HIGHWAY & CITY TRANSPORTATION, INC. *v.* BALESTRI. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 451, 394 N. E. 2d 391.

No. 79–734. MCDONNELL DOUGLAS CORP. *v.* HYCOM, INC. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 224.

No. 79–737. BLUE BELL, INC. *v.* FOWLER. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1276.

No. 79–746. BUCHHOLTZ ET AL. *v.* SWIFT & CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 317.

No. 79–756. ABUJASEN *v.* UNITED STATES; and
No. 79–5668. SORZANO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1201.

No. 79–762. DIFONZO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 1260.

No. 79–763. CHAVEZ ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 603 F. 2d 143.

No. 79–780. CONTINENTAL PLASTICS OF OKLAHOMA, INC. *v.* PLASTIC CONTAINER CORP. C. A. 10th Cir. Certiorari denied. Reported below: 607 F. 2d 885.

No. 79–786. MARKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 582.

No. 79–803. LARKE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 226.

No. 79–810. KNAPP *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 585 S. W. 2d 416.

No. 79–817. MACKENZIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 221.

No. 79–852. LIEBERMAN *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 889.

No. 79–859. CORTINA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 1269.

No. 79–864. PERRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5191. LAGRONE *v.* ALFORD, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–5246. MARQUES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 742.

No. 79–5291. MATTHEWS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 603 F. 2d 48.

No. 79–5305. NEUMANN *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 79–5311. ROBINSON *v.* WOLFF, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 635.

No. 79–5330. BILLINGSLEY *v.* GUNN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 601 F. 2d 602.

No. 79–5335. WILSON *v.* WARDEN, ILLINOIS STATE PENITENTIARY. C. A. 7th Cir. Certiorari denied. Reported below: 600 F. 2d 66.

No. 79–5370. STOUT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 578 S. W. 2d 761.

No. 79–5373. JONAS *v.* ROBINSON, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79–5392. DOMINGUEZ-LAURA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5396. BULLOCK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 1058.

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No. 79–5404. BACA *v.* MALLEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 79–5414. BERRY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 90 Wis. 2d 316, 280 N. W. 2d 204.

No. 79–5436. CRAWFORD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 601 F. 2d 962.

No. 79–5439. IRVING *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 485 Pa. 596, 403 A. 2d 549.

No. 79–5442. GULLEY *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 281.

No. 79–5446. VANDER PAUWERT *v.* UNITED STATES DEPARTMENT OF JUSTICE. C. A. 10th Cir. Certiorari denied.

No. 79–5448. OLIVERO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 789, 416 N. Y. S. 2d 159.

No. 79–5471. JOHNSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 729.

No. 79–5475. ENGLAND *v.* UNITED STATES; and
No. 79–5541. SOLANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 1141.

No. 79–5480. THORNTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–5503. MILLER *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 79–5513. ORTIZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 76.

No. 79–5523. UMBOWER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 754.

No. 79–5526. LENZA *v.* MISSOURI. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 582 S. W. 2d 703.

No. 79–5534. HIBBARD-HUGHES *v.* O'NEIL ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–5536. PROPOTNICK *v.* HENNEPIN COUNTY SHERIFF ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5544. WAGNER *v.* MABRY, CORRECTION COMMISSIONER. C. A. 8th Cir. Certiorari denied. Reported below: 615 F. 2d 1365.

No. 79–5548. FRANCOIS *v.* FRANCOIS. C. A. 3d Cir. Certiorari denied. Reported below: 599 F. 2d 1286.

No. 79–5556. HOLDEN *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5559. FERRELL *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 149 Ga. App. 405, 254 S. E. 2d 404.

No. 79–5562. CHODOS *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 2d Cir. Certiorari denied.

No. 79–5568. JOHNSON *v.* HOWERTON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 507.

No. 79–5581. BREWSTER *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 79–5582. SELLERS *v.* RIDDLE, CORRECTIONAL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5586. ROBESON *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 498, 403 A. 2d 1221.

No. 79–5588. D. C. C. *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 198 Colo. 260, 599 P. 2d 881.

No. 79–5591. MARSH *v.* MORGAN, MARION COUNTY CLERK. Sup. Ct. Ore. Certiorari denied.

No. 79–5592. WOOD *v.* JEFFES, CORRECTIONAL SUPERINTENDENT, ET AL.; and WOOD *v.* DAVIS ET AL. C. A. 3d Cir. Certiorari denied.

No 79–5593. KIMBLE *v.* PLEASANT HILLS CHILDREN'S HOME OF THE ASSEMBLIES OF GOD, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 1193.

No. 79–5595. TENNART *v.* AUCOIN ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5596. SMITH *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied. Reported below: 599 P. 2d 413.

No. 79–5597. HAMPTON *v.* WYRICK, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 606 F. 2d 834.

No. 79–5606. LUMAS *v.* COMMERCIAL CARTAGE CO. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 1209.

No. 79–5608. BUSACCA *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 69 App. Div. 2d 1021, 415 N. Y. S. 2d 314.

No. 79–5611. MORROW *v.* DAYTON NEWSPAPERS, INC. C. A. 6th Cir. Certiorari denied.

No. 79–5615. TOLBERT *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 607 F. 2d 753.

No. 79–5616. JOHNS *v.* WOODBRIDGE TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–5622. CARTER *v.* LYNN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 281.

No. 79–5627. SANDERS ET AL. *v.* TARBUTTON ET AL. C. A. 4th Cir. Certiorari denied.

No. 79–5628. TEPLITSKY *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 1369.

No. 79–5630. CHIARELLO *v.* CHAIRMAN OF THE NEW YORK STATE PAROLE BOARD ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5633. TAMI ET UX. *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied.

No. 79–5636. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS. C. A. 7th Cir. Certiorari denied.

No. 79–5637. FALES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1003.

No. 79–5638. SINCLAIR *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 673.

No. 79–5640. THOMAS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 590.

No. 79–5646. ESHAM *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–5651. YOPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–5654. CERVANTES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 609 F. 2d 974.

No. 79–5656. RODRIGUEZ *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 993.

No. 79–5658. SCRUGGS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 819.

No. 79–5664. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 606 F. 2d 884.

No. 79–5666. EVANKO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 604 F. 2d 21.

No. 79–5671. NEWTOP *v.* JAMES ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5673. COOPER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 96.

No. 79–5675. CHESTNUT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–5690. FRANKLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–5692. ALEXANDER ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5706. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–5713. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–5716. VEYTIA-BRAVO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 1187.

No. 79–5718. TENSLEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 79–5723. SCALF *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 1168.

No. 79–5729. PALACIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79–5735. MOORE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 599 F. 2d 310.

No. 79–5768. LONG *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–101. BLUM, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK, ET AL. *v.* SWIFT ET AL. C. A. 2d Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 598 F. 2d 312.

No. 79–836. MITCHELL, WARDEN *v.* HARRIS. C. A. 4th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 607 F. 2d 1081.

No. 79–377. DOW JONES & CO., INC., ET AL. *v.* UNITED STATES POSTAL SERVICE;

No. 79–378. MAGAZINE PUBLISHERS ASSN., INC., ET AL. *v.* UNITED STATES POSTAL SERVICE; and

No. 79–379. AMERICAN BUSINESS PRESS, INC. *v.* UNITED STATES POSTAL SERVICE. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 197 U. S. App. D. C. 78, 607 F. 2d 392.

No. 79–519. HANDGARDS, INC. *v.* ETHICON, INC.; and

No. 79–674. ETHICON, INC. *v.* HANDGARDS, INC. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 601 F. 2d 986.

No. 79–667. MICHIGAN *v.* ROSALES. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 406 Mich. 624, 281 N. W. 2d 126.

No. 79–726. LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT ET AL. *v.* CITY OF EVANSVILLE, INDIANA, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE STEWART would grant certiorari. Reported below: 604 F. 2d 1008.

No. 79–738. PALMER *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE BRENNAN would grant certiorari. Reported below: 603 F. 2d 1271.

No. 79–739. THORNBURGH, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* PHILADELPHIA WELFARE RIGHTS ORGANIZATION ET AL. C. A. 3d Cir. Motion of respondent Louise Brookins for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 602 F. 2d 1114.

No. 79–5552. THIGPEN *v.* ALABAMA. Ct. Crim. App. Ala.; and

No. 79–5632. ROACH *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: No. 79–5552, 372 So. 2d 385; No. 79–5632, 273 S. C. 194, 255 S. E. 2d 799.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 79–5575. JAGNANDAN ET AL. *v.* MISSISSIPPI STATE UNIVERSITY ET AL. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL would grant certiorari. Reported below: 373 So. 2d 252.

Rehearing Denied

No. 78–1848. UNITED STATES EX REL. PETROFSKY *v.* VAN COTT, BAGLEY, CORNWALL & MCCARTHY ET AL., *ante*, p. 839;

No. 78–6529. TURNER *v.* MASSEY, CORRECTIONAL SUPERINTENDENT, *ante*, p. 914;

No. 78–6683. STODDARD *v.* WEAVER ET AL., *ante*, p. 850; and

No. 78–6785. SILO *v.* WARDEN, HOLMESBURG PRISON, ET AL., *ante*, p. 855. Petitions for rehearing denied.

No. 78–6928. POPE *v.* UNITED STATES, *ante*, p. 925;

No. 79–197. SKOKO ET AL., BOARD OF COUNTY COMMISSIONERS OF CLACKAMAS COUNTY, OREGON *v.* ANDRUS, SECRETARY OF THE INTERIOR, ET AL., *ante*, p. 927;

No. 79–570. STONER *v.* HUTSON ET AL., *ante*, p. 967;

No. 79–5052. GILBERT *v.* YALANZON ET AL., *ante*, p. 873; and

No. 79–5162. LEUSCHNER *v.* MARYLAND, *ante*, p. 933. Petitions for rehearing denied.

No. 78–6903. DYKES *v.* ILLINOIS, *ante*, p. 940;

No. 79–454. SHURE BROTHERS, INC. *v.* KORVETTES, INC., DBA E. J. KORVETTE, *ante*, p. 942;

No. 79–532. HARTE *v.* COUNTY OF LOS ANGELES, *ante*, p. 952;

No. 79–5247. SHAW *v.* SOUTH CAROLINA, *ante*, p. 957;

No. 79–5376. JONES *v.* GEORGIA, *ante*, p. 957;

No. 79–5388. WOJLOH *v.* ADDISON ET AL., *ante*, p. 945;

No. 79–5398. GEORGE *v.* LOUISIANA, *ante*, p. 953;

No. 79–5399. TORGERSON *v.* MCCLAY, *ante*, p. 953;

No. 79–5407. STEVENS *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *ante*, p. 945; and

No. 79–5424. JAFREE *v.* SCOTT, ATTORNEY GENERAL OF ILLINOIS, *ante*, p. 945. Petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these petitions.

No. 78–6762. ROGERS *v.* LING ET AL., *ante*, p. 854. Motion for leave to file petition for rehearing denied.

No. 79–203. OCHS *v.* UNITED STATES, *ante*, p. 955; and

No. 79–5125. RUIZ *v.* CALIFORNIA, *ante*, p. 943. Motions for leave to file petitions for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of these motions.

JANUARY 11, 1980

Miscellaneous Order

No. A–600 (79–5919). TRIMBLE *v.* CONLEY, JUDGE, ET AL. Sup. Ct. Mo. Application for stay, addressed to THE CHIEF JUSTICE, and by him referred to the Court, denied.

JANUARY 14, 1980

Appeals Dismissed

No. 78–1422. RETIREMENT FUND TRUST OF THE PLUMBING, HEATING & PIPING INDUSTRY OF SOUTHERN CALIFORNIA *v.* JOHNS. Appeal from Ct. App. Cal., 4th App. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 85 Cal. App. 3d 511, 149 Cal. Rptr. 551.

No. 78–1881. CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA *v.* CAMPA ET AL. Appeal from Ct. App. Cal., 1st App. Dist., dismissed for want of substantial federal question. Reported below: 89 Cal. App. 3d 113, 152 Cal. Rptr. 362.

Vacated and Remanded After Certiorari Granted

No. 79–136. DIAMOND, COMMISSIONER OF PATENTS AND TRADEMARKS *v.* CHAKRABARTY. C. C. P. A. [Certiorari granted *sub nom. Parker* v. *Bergy* and *Parker* v. *Chakrabarty*, *ante*, p. 924.] Judgment as to *In re Bergy et al.* vacated and case remanded with directions to dismiss the appeal as moot. Motion of Cornell D. Cornish for leave to file a brief as *amicus curiae* granted.

Certiorari Granted—Vacated and Remanded. (See also 79–5180, *ante*, p. 248.)

No. 79–759. PERINI NORTH RIVER ASSOCIATES ET AL. *v.* FUSCO ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light

of *P. C. Pfeiffer Co.* v. *Ford, ante,* p. 69. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN dissent. Reported below: 601 F. 2d 659.

Miscellaneous Orders

No. A–538. GUSIKOFF ET AL. *v.* UNITED STATES. D. C. S. D. Fla. Application for stay pending appeal to the United States Court of Appeals for the Fifth Circuit, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. A–592. BURLINGTON NORTHERN, INC. *v.* UNITED STATES ET AL. Application for stay of an order of the Interstate Commerce Commission pending appeal to the United States Court of Appeals for the Sixth Circuit, presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. D–170. IN RE DISBARMENT OF COHEN. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–172. IN RE DISBARMENT OF BENDES. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–174. IN RE DISBARMENT OF SPOONER. Disbarment entered. [For earlier order herein, see *ante,* p. 894.]

No. D–183. IN RE DISBARMENT OF BARNES. It is ordered that Harry Davis Barnes, of Elkton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Exceptions to Report of the Special Master set for oral argument in due course. MR. JUSTICE MARSHALL took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g., ante,* p. 816.]

No. 78–6029. LaRocca *v.* United States. C. A. 3d Cir. [Certiorari granted, 442 U. S. 916.] Motion for appointment of counsel granted, and it is ordered that Gerald Goldman, Esquire, of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 79–4. Williams et al. *v.* Zbaraz et al.;

No. 79–5. Miller, Acting Director, Department of Public Aid of Illinois, et al. *v.* Zbaraz et al.; and

No. 79–491. United States *v.* Zbaraz et al. D. C. N. D. Ill. [Probable jurisdiction postponed, *ante*, p. 962.] Motion of Alan Ernest to be appointed counsel for children unborn and born alive denied. Motion of Legal Defense Fund for Unborn Children for leave to file a brief as *amicus curiae* denied.

No. 79–48. Andrus, Secretary of the Interior, et al. *v.* Glover Construction Co. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motion of petitioner to dispense with printing appendix granted.

No. 79–134. Consolidated Edison Company of New York, Inc. *v.* Public Service Commission of New York. Ct. App. N. Y. [Probable jurisdiction noted, *ante*, p. 822.] Motions of New England Legal Foundation, Long Island Lighting Co., and New York State Consumer Protection Board et al. for leave to file briefs as *amici curiae* granted.

No. 79–192. New York Gaslight Club, Inc., et al. *v.* Carey. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of New York State Division of Human Rights et al. for leave to file a brief as *amici curiae* granted.

No. 79–5863. Godwin *v.* United States. C. A. 2d Cir. Motion of petitioner to seal petition denied.

Probable Jurisdiction Noted

No. 79–492. FUNGAROLI *v.* FUNGAROLI. Appeal from Ct. App. N. C. Motion of appellee for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. Reported below: 40 N. C. App. 397, 252 S. E. 2d 849.

Certiorari Granted

No. 79–677. REEVES, INC. *v.* KELLEY ET AL. C. A. 8th Cir. Certiorari granted. Reported below: 603 F. 2d 736.

No. 79–5601. GOMEZ *v.* TOLEDO. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 602 F. 2d 1018.

Certiorari Denied. (See also No. 79–1422, *supra.*)

No. 79–107. CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL. *v.* PERVEL INDUSTRIES, INC. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 214.

No. 79–218. ZIPERSTEIN ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 281.

No. 79–258. BUCYRUS-ERIE CO. *v.* DEPARTMENT OF INDUSTRY, LABOR, AND HUMAN RELATIONS OF WISCONSIN ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 599 F. 2d 205.

No. 79–505. UNIHEALTH SERVICES CORP. *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–554. ALPINE INVESTMENTS, INC. *v.* BARTON ET AL. Sup. Ct. Okla. Certiorari denied. Reported below: 596 P. 2d 532.

No. 79–595. NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. *v.* LONG ISLAND LIGHTING CO.; and

No. 79–629. LONG ISLAND LIGHTING CO. *v.* NEW YORK STATE PUBLIC SERVICE COMMISSION ET AL. C. A. 2d Cir. Certiorari before judgment denied.

No. 79–598. MICHAEL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1198.

No. 79–603. HOTEL CONQUISTADOR, INC. *v.* UNITED STATES; and

No. 79–742. UNITED STATES *v.* HOTEL CONQUISTADOR, INC. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 20, 597 F. 2d 1348.

No. 79–661. LAGORGA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79–662. BIRDMAN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 547.

No. 79–679. CONTINENTAL GROUP, INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 603 F. 2d 444.

No. 79–758. GASORAMA, INC. *v.* IMPERIAL GAS COMPANY OF PUERTO RICO, INC. Super. Ct. P. R. Certiorari denied.

No. 79–760. FLORES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 581 S. W. 2d 490.

No. 79–767. STATE FARM FIRE & CASUALTY CO. *v.* HIME. Sup. Ct. Minn. Certiorari denied. Reported below: 284 N. W. 2d 829.

No. 79–768. DEJOHN *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 486 Pa. 32, 403 A. 2d 1283.

No. 79–769. TRUSTEES OF THE COLORADO CEMENT MASONS APPRENTICE TRUST FUND ET AL. *v.* LEVY ET AL. C. A. 10th Cir. Certiorari denied.

No. 79–773. VAGLE *v.* PICKANDS MATHER & Co. C. A. 8th Cir. Certiorari denied.

No. 79–781. HAMLIN *v.* F. GREGORIE & SON ET AL. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 412, 257 S. E. 2d 699.

No. 79–785. PEACHES *v.* CITY OF EVANSVILLE, INDIANA, ET AL. Ct. App. Ind. Certiorari denied. Reported below: — Ind. App. —, 389 N. E. 2d 322.

No. 79–806. DUNGAN *v.* KENTUCKY BAR ASSN. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 15.

No. 79–857. RAIMONDI *v.* COURT OF APPEALS OF MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 285 Md. 607, 403 A. 2d 1234.

No. 79–865. SCHIFALACQUA *v.* CONTINENTAL CASUALTY CO., AKA CNA INSURANCE, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–871. MAYO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–874. TREASURE ISLE, INC. *v.* CARR, U. S. DISTRICT JUDGE. C. A. 5th Cir. Certiorari denied.

No. 79–5139. SINCLAIR *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79–5520. JOHNSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 1025.

No. 79–5527. TONEY ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 1349.

No. 79–5529. Cook *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1175.

No. 79–5535. Williams *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 14.

No. 79–5574. De Vito *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–5589. Rivera *v.* Secretary of Health, Education, and Welfare. C. A. 1st Cir. Certiorari denied. Reported below: 607 F. 2d 993.

No. 79–5645. Kyles *v.* Klein, Director, Department of Health and Welfare of Idaho, et al. C. A. 9th Cir. Certiorari denied.

No. 79–5648. Wilson *v.* American Can Co. et al. C. A. 3d Cir. Certiorari denied.

No. 79–5660. Moldovan *v.* Allis Chalmers Manufacturing Co. et al. Ct. App. Mich. Certiorari denied. Reported below: 83 Mich. App. 373, 268 N. W. 2d 656.

No. 79–5678. Curry *v.* Bureau of Corrections of Kentucky et al. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 371.

No. 79–5687. Ramsey *v.* Western Union Telegraph Co. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 368 So. 2d 1377.

No. 79–5743. Martinez *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 361.

No. 79–5749. Burnet *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5750. Luck *v.* Strickland, Corrections Superintendent, et al. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1203.

No. 79–5756. MANN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–5758. HODGES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 520.

No. 79–5759. MCGILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1252.

No. 79–5770. DEL PRETE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1374.

No. 79–5772. CORRAL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79–5781. WOODING *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 78–1445. SOUTHERN CALIFORNIA IBEW–NECA PENSION PLAN ET AL. *v.* JOHNSTON ET VIR. Ct. App. Cal., 2d App. Dist. Motion of respondent Frances E. Johnston for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 85 Cal. App. 3d 900, 149 Cal. Rptr. 798.

No. 79–583. MINNESOTA *v.* HELENBOLT. Sup. Ct. Minn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 280 N. W. 2d 631.

No. 79–666. BISHOP ET AL. *v.* FURTADO ET AL. C. A. 1st Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 604 F. 2d 80.

No. 79–486. UNITED STATES STEEL CORP. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 283.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE WHITE and MR. JUSTICE POWELL join, dissenting.

On August 7, 1977, Congress enacted the Clean Air Act Amendments of 1977, Pub. L. 95–95, 91 Stat. 685. These

Amendments required compliance by 1982 with various ambient air quality standards promulgated earlier by the United States Environmental Protection Agency (EPA). Under the Amendments, the States were to submit to EPA a list of "nonattainment areas," *i. e.*, those regions measured as not complying with EPA's standards. The deadline for this submission was December 5, 1977. EPA was then to promulgate a composite list of nonattainment areas by February 3, 1978. Finally, the States were to rely upon EPA's list in formulating "State Implementation Plans" by January 1, 1979. According to the Amendments, these plans were to impose certain stringent restrictions upon industries located in regions designated as nonattainment areas.

Both petitioners have facilities located in Lake County, Ind., which was included in the list of nonattainment areas submitted by the State of Indiana to EPA on December 5, 1977. EPA promulgated its list, which included Lake County, on March 3, 1978. At the same time, EPA announced that the designations were immediately applicable and effective. In explaining its failure to promulgate the list as a proposed rule and to comply with the notice-and-comment provisions of the Administrative Procedure Act, 5 U. S. C. § 553, EPA asserted that it had "good cause" to dispense with the requirements as provided in 5 U. S. C. §§ 553 (b)(B) and 553 (d)(3). In particular it cited the need to give the States immediate guidance on the location of nonattainment areas so that those States could meet the deadline of January 1, 1979, for their implementation plans. EPA did solicit after-the-fact comments, due by May 2, 1978, and subsequently amended its list in certain respects not relevant here.

Petitioners brought the present action for review in the United States Court of Appeals for the Seventh Circuit, claiming, *inter alia*, that EPA's designation of Lake County as a nonattainment area was "not in accordance with law" under the APA because of EPA's failure to follow the notice-and-

comment procedure. The Court of Appeals rejected this claim on two grounds. First, it held that the tight statutory schedule under which EPA was operating provided that agency with "good cause" to dispense with the usual procedures. 605 F. 2d 283, 286 (1979). Second, it held that, under 42 U. S. C. § 7607 (d)(9) (1976 ed., Supp. I), even if EPA had failed to abide by the procedural requirements of the APA its action would not be reversed unless petitioners demonstrated that they had objected to the procedure during the grace period provided by EPA for after-the-fact comments and that the error was " 'so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.' " 605 F. 2d, at 290, quoting 42 U. S. C. § 7607 (d)(8) (1976 ed., Supp. I) as incorporated by § 7607 (d)(9)(D) (1976 ed., Supp. I). According to the Court of Appeals, petitioners had failed to carry their burden as to either of these factors.

The first holding of the court below is in square conflict with the decisions of two other Courts of Appeals. In *Sharon Steel Corp.* v. *EPA*, 597 F. 2d 377 (CA3 1979), and *United States Steel Corp.* v. *EPA*, 595 F. 2d 207 (CA5 1979), the Courts of Appeals for the Third and Fifth Circuits held that EPA did not have good cause to dispense with notice-and-comment rulemaking in promulgating the very list at issue here.

While conceding that a conflict exists, EPA argues that "the unique statutory circumstances that created the practical need to promulgate the original designations without prior notice and comment no longer exist, and the issue presented . . . will not recur." Brief in Opposition 7. In the area of environmental regulation, however, tight statutory schedules are both quite common and frequently unmet. If EPA's actions in the present case pass without review by this Court, persons subject to EPA's jurisdiction in different parts of the country will be entitled to different procedural protections when either they or EPA find themselves up against a dead-

line. Moreover, these recurring deadlines will almost invariably have passed by the time this Court receives a petition, allowing EPA to argue in each case that, because the deadline has passed, the issue is no longer ripe for review. While no party claims this case is moot, the fact that the issue is "capable of repetition, yet evad[es] review," *Southern Pacific Terminal Co.* v. *ICC*, 219 U. S. 498, 515 (1911), makes this a classic case for a grant of certiorari.

As for the alternative holding of the court below, it appears that the unusually strong showing demanded by § 7607 (d)(9)(D), but not by the APA, is required only in certain types of actions listed in § 7607 (d)(1). See 42 U. S. C. § 7607 (d)(9) (1976 ed., Supp. I). Although the Court of Appeals suggested that promulgation of the list "arguably" could be characterized as one of those enumerated actions, it went well beyond the statutory language to hold that "Congress meant this limitation on review of procedural errors to extend to all rulemaking by the EPA whether or not it is in the explicit categories covered by all the provisions of section 7607 (d)." 605 F. 2d, at 291. As petitioners point out, this ruling has the effect of establishing two Administrative Procedure Acts, one for the EPA and one for all other agencies.

Apparently uncomfortable with this holding, EPA attempts to dismiss it as dicta. Brief in Opposition 9. It clearly is not. It was an independent, alternative basis for the decision of the court below, no more dicta than its companion holding that EPA demonstrated good cause. In fact, the Court of Appeals relied on its interpretation of § 7607 (d)(9) as a reason for rejecting the conclusions of the Third Circuit and the Fifth Circuit as to the legality of EPA's action. See 605 F. 2d, at 291, n. 14.

Either of these issues might merit certiorari in its own right; in tandem they present a formidable candidate for review. The fact that the requirements of the Clean Air Act Amendments virtually swim before one's eyes is not a rational basis, under these circumstances, for refusing to exercise our discre-

tionary jurisdiction. Admittedly, it would be easier to decide a case turning on common-law principles of property or contract, and more interesting to decide a case involving competing fundamental principles of constitutional law. But here, in grappling with the problem of air pollution on a nationwide basis, Congress has quite understandably enacted a very complex statute that seeks to accomplish regulatory goals while at the same time providing procedural protection for the regulated. It might have avoided some of the complexity by making the EPA administrator a virtual czar to the extent allowed by the Constitution, but it chose a more balanced approach. Congress has made this choice and has designated the courts of appeals to construe the innumerable provisions of the Act. We can avoid invocation of our jurisdiction to resolve conflicts among the decisions of the courts of appeals construing important sections of the statute only by breaking faith with the spirit, if not the letter, of those Acts of Congress making our jurisdiction in virtually all cases discretionary rather than obligatory. I therefore would grant the writ of certiorari.

No. 79–765. WEBSTER *v.* BOARD OF EDUCATION OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Motion of Chicago Lawyers' Committee for Civil Rights Under Law, Inc., for leave to file a brief as *amicus curiae* granted. Certiorari denied. Reported below: 599 F. 2d 793.

No. 79–766. MCGHEE *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE WHITE would grant certiorari. Reported below: 280 N. W. 2d 436.

No. 79–5383. G. G. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79–5401. T.A.S. *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari.

No. 79–5462. KAUFMAN *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied. MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL would grant certiorari and reverse the conviction.

Rehearing Denied

No. 79–585. DOUBLEDAY & CO., INC. *v.* BINDRIM, *ante*, p. 984. Petition for rehearing denied.

JANUARY 17, 1980

Dismissal Under Rule 60

No. 79–438. GALLAGHER ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 602 F. 2d 1139.

JANUARY 21, 1980

Appeals Dismissed

No. 79–606. LUMBER, PRODUCTION & INDUSTRIAL WORKERS LOCAL 2362 *v.* WONDZELL ET AL. Appeal from Sup. Ct. Alaska dismissed for want of substantial federal question. MR. JUSTICE WHITE and MR. JUSTICE REHNQUIST would note probable jurisdiction and set case for oral argument. Reported below: 601 P. 2d 584.

No. 79–776. KOKER ET UX. *v.* SAGE ET AL. Appeal from Ct. App. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–834. AUTOMOBILE DRIVERS & DEMONSTRATORS UNION LOCAL NO. 882 ET AL. *v.* DEPARTMENT OF RETIREMENT SYSTEMS OF WASHINGTON. Appeal from Sup. Ct. Wash. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 92 Wash. 2d 415, 598 P. 2d 379.

No. 79–5694. PARISH *v.* PARISH. Appeal from Sup. Ct. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 374 So. 2d 351.

No. 79–820. MINNESOTA MINING & MANUFACTURING CO. *v.* MINNESOTA, BY WILSON, COMMISSIONER, DEPARTMENT OF HUMAN RIGHTS. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this case. Reported below: 289 N. W. 2d 396.

No. 79–5465. MARKOFF *v.* AMERICAN HERITAGE LIFE INSURANCE CORP. ET AL. Appeal from Sup. Ct. Nev. dismissed for want of a properly presented federal question.

No. 79–787. KAVANAGH ET AL. *v.* LONDON GROVE TOWNSHIP ET AL. Appeal from Sup. Ct. Pa. dismissed for want of substantial federal question. Reported below: 486 Pa. 133, 404 A. 2d 393.

Certiorari Granted—Reversed and Remanded. (See No. 79–5386, *ante*, p. 469.)

Miscellaneous Orders

No. A–435 (79–851). CLAUSER *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Application for bail, addressed to MR. JUSTICE POWELL and referred to the Court, denied.

No. A–576. CITIZENS CONCERNED FOR SEPARATION OF CHURCH AND STATE *v.* CITY AND COUNTY OF DENVER. Application to vacate stay entered by the United States Court of Appeals for the Tenth Circuit, presented to MR. JUSTICE WHITE, and by him referred to the Court, denied. MR. JUSTICE MARSHALL would grant the application.

No. A–596. IN RE OBERKOETTER. C. A. 1st Cir. Application for stay, addressed to MR. JUSTICE MARSHALL and referred to the Court, denied.

No. D–181. In re Disbarment of Freedson. Disbarment entered. [For earlier order herein, see *ante*, p. 922.]

No. D–184. In re Disbarment of Cain. It is ordered that Carl L. Cain, of Los Angeles, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 5, Orig. United States *v.* California. Exception to Report of the Special Master set for oral argument in due course. Mr. Justice Marshall took no part in the consideration or decision of this order. [For earlier order herein, see, *e. g.*, *ante*, p. 816.]

No. 79–66. Aaron *v.* Securities and Exchange Commission. C. A. 2d Cir. [Certiorari granted, *ante*, p. 914.] Motion of Securities Industry Association for leave to file a brief as *amicus curiae* granted.

No. 79–192. New York Gaslight Club, Inc., et al. *v.* Carey. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of the Attorney General of New York et al. for leave to participate in oral argument as *amici curiae* denied.

No. 79–813. American Commercial Lines, Inc. *v.* Griffith et al. C. A. 3d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted

No. 79–1082. National Labor Relations Board *v.* International Longshoremen's Assn., AFL–CIO, et al. C. A. D. C. Cir. Certiorari granted. Reported below: 198 U. S. App. D. C. 157, 613 F. 2d 890.

No. 79–838. Maine et al. *v.* Thiboutot et vir. Sup. Jud. Ct. Me. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 405 A. 2d 230.

Certiorari Denied. (See also Nos. 79–776, 79–834, and 79–5694, *supra.*)

No. 78–1737. FOLEY ET AL. *v.* UNITED STATES;

No. 78–1838. ROBERT L. GRUEN, INC. *v.* UNITED STATES;

No. 79–93. SHANNON & LUCHS CO. *v.* UNITED STATES; and

No. 79–186. BOGLEY, INC., ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 598 F. 2d 1323.

No. 79–248. CERILLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 603 F. 2d 415.

No. 79–355. SANCHEZ *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 582 S. W. 2d 813.

No. 79–373. JONES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 485.

No. 79–385. MCCARTHY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 1139.

No. 79–471. STRINGER *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–496. MOORE *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. Reported below: 65 Ill. App. 3d 712, 382 N. E. 2d 810.

No. 79–529. CHURCH OF SCIENTOLOGY OF CALIFORNIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 591 F. 2d 533.

No. 79–531. NEWELL ET AL. *v.* ORLEANS PARISH SCHOOL BOARD. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 370 So. 2d 655 and 658.

No. 79–542. HAY *v.* TEXAS BOARD OF PARDONS AND PAROLE. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 447.

No. 79–568. OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA *v.* SAFFO ET AL.; and

No. 79–573. KAVNER *v.* OCCIDENTAL LIFE INSURANCE COMPANY OF CALIFORNIA ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 602 F. 2d 1265.

No. 79–569. WEATHERSBY *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–647. COPELAND *v.* MARTINEZ, DIRECTOR, COMMUNITY SERVICES ADMINISTRATION. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 399, 603 F. 2d 981.

No. 79–685. DRESSER INDUSTRIES, INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1231.

No. 79–686. POWER *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 157, 597 F. 2d 258.

No. 79–687. KYZAR *v.* HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 68.

No. 79–691. INDIANAPOLIS POWER & LIGHT CO. ET AL. *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79–695. BOSCH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 590 F. 2d 165.

No. 79–705. HOUSEHOLD FINANCE CORP. ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 1255.

No. 79–707. UPTEGROVE ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 600 F. 2d 1248.

No. 79–708. PHILADELPHIA FOOD STORE EMPLOYERS' LABOR COUNCIL *v.* RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL 1349, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 575.

No. 79–723. SHELBY COUNTY GOVERNMENT *v.* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 588.

No. 79–730. PUERTO RICO ET AL. *v.* COMMONWEALTH OIL REFINING CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1239.

No. 79–732. PHELPS *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 226 Kan. 371, 598 P. 2d 180.

No. 79–778. BOARD OF TRUSTEES OF KEENE STATE COLLEGE ET AL. *v.* SWEENEY. C. A. 1st Cir. Certiorari denied. Reported below: 604 F. 2d 106.

No. 79–794. DEVITO, DIRECTOR, DEPARTMENT OF MENTAL HEALTH & DEVELOPMENTAL DISABILITIES *v.* LANG. Sup. Ct. Ill. Certiorari denied. Reported below: 76 Ill. 2d 311, 391 N. E. 2d 350.

No. 79–798. DEAN ET AL. *v.* AUSTIN, SECRETARY OF STATE OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 602 F. 2d 121.

No. 79–818. KARIJOLIC *v.* ILLINOIS BELL TELEPHONE CO. C. A. 7th Cir. Certiorari denied. Reported below: 601 F. 2d 596.

No. 79–821. MORGAN & CO., INC. *v.* OLIN CORP., INC. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1048.

No. 79–828. EDWARDS & HANLEY *v.* WELLS FARGO SECURITIES CLEARANCE CORP. C. A. 2d Cir. Certiorari denied. Reported below: 602 F. 2d 478.

No. 79–845. ALAMEDA COUNTY WATER DISTRICT *v.* SETHY. C. A. 9th Cir. Certiorari denied. Reported below: 602 F. 2d 894.

No. 79–891. SAXON *v.* JOHNSTON ET AL. Sup. Ct. Miss. Certiorari denied.

No. 79–892. DORMINEY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1220.

No. 79–941. EDGEWOOD HEALTH CARE CENTER, INC. *v.* UNITED STATES C. A. 1st Cir. Certiorari denied. Reported below: 608 F. 2d 13.

No. 79–5447. IN RE APPLICATION FOR ADMISSION TO THE BAR OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 378 Mass. 795, 392 N. E. 2d 533.

No. 79–5452. FELTS ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 146.

No. 79–5511. WILLIAMS *v.* ANDERSON ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 599 F. 2d 923.

No. 79–5558. EATON *v.* NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES. Super. Ct. N. J. Certiorari denied.

No. 79–5572. LILLIBRIDGE ET UX. *v.* MORTON, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5600. HINES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 132.

No. 79–5603. COLON *v.* FLORIDA. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 364 So. 2d 899.

No. 79–5607. DAVIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–5643. FORD *v.* CIMINO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 574.

No. 79–5661. THOMAS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5669. PFISTER *v.* ANDERSON CLINIC, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 601 F. 2d 581.

No. 79–5676. GATTERMANN ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 79–5682. JASPER *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 79–5684. BRINLEE *v.* CRISP, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 608 F. 2d 839.

No. 79–5689. WILLIS *v.* CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 79–5691. MCCLOUD *v.* FOGG, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 79–5695. SANDERS *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 590, 260 S. E. 2d 504.

No. 79–5696. KENNEDY *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 393 N. E. 2d 139.

No. 79–5698. FRANCISSE *v.* HOLLYWOOD CHEROKEE APARTMENTS ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 79–5701. TIAO-MING WU *v.* BOARD OF HIGHER EDUCATION, CUNY, ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–5708. PHILLIPS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 70 App. Div. 2d 764, 419 N. Y. S. 2d 440.

No. 79–5711. SAYLOR *v.* OVERBERG, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 773.

No. 79–5715. GERSON *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–5717. TAYLOR *v.* DALSHEIM, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 807.

No. 79–5720. STONECIPHER *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 581 S. W. 2d 491.

No. 79–5730. CRANE *v.* YOUNGER, ATTORNEY GENERAL OF CALIFORNIA, ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5748. WRAY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 722.

No. 79–5766. DOBY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 704, 258 S. E. 2d 896.

No. 79–5771. GRINDSTAFF *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 614 F. 2d 773.

No. 79–5786. LANCELIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 624 F. 2d 1103.

No. 79–5787. MONTOYA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5796. HILL ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5810. SHANKS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 73.

No. 79–777. VERMONT *v.* WILLIAMS. Sup. Ct. Vt. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 137 Vt. 360, 406 A. 2d 375.

No. 79–772. California Fair Political Practices Commission *v.* Superior Court of Los Angeles County (Institute of Governmental Advocates, Real Party in Interest). Sup. Ct. Cal. Certiorari denied. Mr. Justice White and Mr. Justice Blackmun would grant certiorari. Reported below: 25 Cal. 3d 33, 599 P. 2d 46.

No. 79–5704. Clark *v.* Virginia. Sup. Ct. Va.; and

No. 79–5722. Carriger *v.* Arizona. Sup. Ct. Ariz. Certiorari denied. Reported below: No. 79–5704, 219 Va. 237, 257 S. E. 2d 784; No. 79–5722, 123 Ariz. 335, 599 P. 2d 788.

Mr. Justice Brennan and Mr. Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 78–5937. Ybarra *v.* Illinois, *ante*, p. 85;

No. 79–534. Parrish *v.* Kentucky, *ante*, p. 966;

No. 79–611. Vasilios *v.* United States, *ante*, p. 967;

No. 79–5255. Amadeo *v.* Georgia, *ante*, p. 974; and

No. 79–5418. Waldrop *v.* Commissioner of Internal Revenue, *ante*, p. 993. Petitions for rehearing denied.

No. 79–245. United Methodist Church et al. *v.* Barr et al., *ante*, p. 973. Petition for rehearing denied. Mr. Justice Blackmun took no part in the consideration or decision of this petition.

No. 79–5355. Mahler *v.* Weiss, *ante*, p. 944. Motion for leave to file petition for rehearing denied. Mr. Justice Marshall took no part in the consideration or decision of this motion.

FEBRUARY 4, 1980

Dismissal Under Rule 60

No. 79–847. SANDINI *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60.

FEBRUARY 12, 1980

Dismissal Under Rule 60

No. 79–713. MORRILTON SCHOOL DISTRICT No. 32 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari dismissed as to petitioner Plumerville School District No. 39 under this Court's Rule 60. [See also *post*, p. 1071.] Reported below: 606 F. 2d 222.

FEBRUARY 19, 1980

Affirmed on Appeal

No. 79–504. UNITED STATES ET AL. *v.* MISSISSIPPI; and

No. 79–528. HENRY ET AL. *v.* MISSISSIPPI. Affirmed on appeal from D. C. D. C. Reported below: 490 F. Supp. 569.

MR. JUSTICE STEVENS, concurring in the judgment.

In 1965, a three-judge District Court was convened in Mississippi to deal with allegations of malapportionment in Mississippi's State Legislature. By 1975, an acceptable reapportionment plan still had not been formulated; nevertheless, quadrennial elections were held under a court-ordered plan.[1] In 1978, the Mississippi Legislature enacted a statutory reapportionment plan, which was submitted to the Attorney General of the United States for preclearance under the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. § 1973 *et seq.* When the Attorney General objected to the plan, the State brought this action in a three-judge District Court in the District of Columbia, seeking a declaratory judgment that the plan was in compliance with the Act. In 1979, while the Voting Rights Act case was still pending, the three-judge court in Mississippi entered a judgment putting into

[1] The history of that litigation is described at length in MR. JUSTICE MARSHALL's dissenting opinion in *Connor* v. *Coleman*, 440 U. S. 612, 614.

effect a reapportionment plan agreed to by all parties. *Connor* v. *Finch*, 469 F. Supp. 693 (SD Miss.). That plan was essentially a modified version of the statutory plan.

Under the Voting Rights Act the task confronting the District of Columbia court was to determine whether the statutory plan had the purpose or effect of denying or abridging the right to vote on account of race or color. 42 U. S. C. § 1973c. An impermissible effect is created whenever a reapportionment plan has the effect of diluting existing black voting strength. See *Beer* v. *United States*, 425 U. S. 130, 141. The District of Columbia court compared the statutory reapportionment plan to the 1979 court-ordered plan in order to determine whether any prohibited retrogression had occurred. Concluding that it had not and that there was no purpose to discriminate evident in the statutory plan, the court granted the State a declaratory judgment approving the plan. Both the United States and intervenors (black voters in Mississippi) appealed. The Court today affirms, without opinion.

In my judgment the only significant issue presented on appeal is whether the statutory plan had the impermissible effect of diluting black voting strength. In his dissenting opinion MR. JUSTICE MARSHALL presents a persuasive case that there were significant discrepancies between the statutory plan and the 1979 court-ordered plan. Because I believe that the 1979 plan was not the proper benchmark to be used in determining whether there was an impermissible effect, I have no occasion to comment on his conclusion that the differences between the two plans were sufficient to constitute a "dilution" of black voting strength.

As a technical matter, the court-ordered plan was the plan "in effect" at the time the District of Columbia court decided the case.[2] Nevertheless, all of the parties to both actions realized that the statutory plan would be used in the 1979

[2] The statutory plan could not become effective until it was cleared pursuant to the Voting Rights Act by either the Attorney General or the three-judge court in the District of Columbia. *Connor* v. *Waller*, 421

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elections if it received court approval in time. See *Connor* v. *Coleman*, 440 U. S. 612, 622 (MARSHALL, J., dissenting). Thus, in practical terms, the court-ordered plan was never more than a backup. To use such a plan as a benchmark for judging the effect of the statutory plan on voting rights seems to me to be logically indefensible. No voting rights in Mississippi were ever affected by the backup plan and thus any "changes" due to the imposition of the statutory plan could hardly have diluted those rights. Moreover, to require a state legislature to predict what court-ordered plans may be entered while a Voting Rights Act suit is pending and then to draw its plan to ensure that no dilution occurs seems to me to be a futile exercise clearly not required by the statute.

Thus, in my view the statutory plan was permissible under the Act so long as it did not have a discriminatory purpose and did not dilute black voting strength as it existed at the time the legislation was passed. The District Court's findings of fact make it clear that the plan met these conditions.[3] I therefore concur in the judgment affirming the decision of the court below.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE WHITE join, dissenting.

For more than 15 years private litigants, often joined by the United States, have sought to obtain an apportionment

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U. S. 656. The judgment entered by the Mississippi court, on the other hand, specifically provided that the court-ordered plan was to be in "full force and effect for the 1979 regular state legislative elections and thereafter unless and until altered according to law." *Connor* v. *Finch*, 469 F. Supp. 693, 694 (SD Miss. 1979). Thus, the court-ordered plan would have remained in effect if the District of Columbia court had not approved the statutory plan.

[3] The court noted that when compared to the 1975 apportionment plan that had governed the last elections, the statutory plan constituted a "clear enhancement of the position of racial minorities with respect to their effective exercise of the electoral franchise. . . ." App. to Juris. Statement in No. 79-504, p. 32a, n. 6.

plan in Mississippi which satisfies the requirements of the Equal Protection Clause and the Voting Rights Act of 1965. By today's summary affirmance, the Court assures that these efforts will remain to a substantial degree unsuccessful. I dissent.

I

Brought in 1965, this case has a procedural history that can charitably be described as bizarre. Both state officials and the three-judge District Court for the Southern District of Mississippi have shown a firm determination to avoid implementation of an apportionment plan which complies with constitutional and statutory requirements.[1] The case has been before this Court no fewer than eight times; we have invalidated plans proposed by the District Court on four occasions. *Connor* v. *Johnson*, 402 U. S. 690 (1971); *Connor* v. *Williams*, 404 U. S. 549 (1972); *Connor* v. *Waller*, 421 U. S. 656 (1975); *Connor* v. *Finch*, 431 U. S. 407 (1977).

In *Connor* v. *Finch*, we ordered the District Court to draw a lawful apportionment plan "with a compelling awareness of the need for its expeditious accomplishment, so that the citizens of Mississippi at long last will be enabled to elect a legislature that properly represents them." *Id.*, at 426. Two more years passed, and no such plan was drawn. When the case was here last Term, the plaintiffs sought leave to file a petition for a writ of mandamus to require the District Court to do what we have ordered. On March 26, 1979, the Court granted leave to file the petition, but it postponed action for 30 days, instructing the District Court to enter a plan "forthwith and without further delay." *Connor* v. *Coleman*, 440 U. S. 612, 614.[2] On April 13, 1979, the District Court entered a final judgment embodying a plan agreed to by all

[1] The procedural background is described in detail in my dissenting opinion in *Connor* v. *Coleman*, 440 U. S. 612, 614–621 (1979).

[2] I would have issued the writ immediately. See *Connor* v. *Coleman*, *supra*, at 614 (dissenting opinion).

parties.[3] Unfortunately, this settlement plan did not end the litigation.

Almost a year earlier, on April 21, 1978, the Governor of Mississippi had approved a statutory reapportionment plan designed to supersede any court-ordered plan to be produced in this litigation. The statutory plan was submitted to the Attorney General of the United States for preclearance under the Voting Rights Act of 1965, 42 U. S. C. § 1973 *et seq.* On July 31, 1978, the Attorney General entered a timely objection on the ground that the State had failed to carry its burden of proving the absence of a discriminatory purpose or effect. See 42 U. S. C. § 1973c. The State of Mississippi filed the present action in the United States District Court for the District of Columbia, seeking a declaratory judgment under the Voting Rights Act that the statutory plan did not have the prohibited purpose or effect. Ten Mississippi Negro voters intervened, urging that the statutory plan be declared invalid. On June 1, 1979, the District Court entered the declaration requested by the State, and it is that judgment which is the subject of the present appeal.

II

The legality of the statutory plan depends on whether it has the purpose or effect of diluting Negro voting strength in Mississippi. If the statutory plan is retrogressive, it is forbidden under the Voting Rights Act. *Beer* v. *United States*, 425 U. S. 130 (1976). The District Court correctly measured the statutory plan against the present apportionment of the Mississippi Legislature, which is the settlement plan embodied in the final judgment entered by the District Court for the

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[3] The petition for a writ of mandamus was denied on May 21, 1979, *Connor* v. *Coleman*, 441 U. S. 792; we noted that the Clerk of the District Court had "stated that all parties to the litigation have announced in open court that there will be no appeal." *Ibid.*

Southern District of Mississippi in response to our instruction to enter a plan "forthwith and without further delay." [4]

The District Court's findings reveal a long history of denial of Negro voting rights in Mississippi. Official use of racially discriminatory devices such as literacy tests, poll taxes, and white primaries effectively excluded Negroes from participation in the electoral process until the passage of the Voting Rights Act in 1965. The current effects of past discrimination are manifested in serious underrepresentation of Negroes in the state legislature. Although the latest census showed that Mississippi's population is 36.8% Negro, prior to the 1979 elections there were only four Negroes in the 122-member House of Representatives and none in the 52-member Senate. Because of racial bloc voting and low Negro voter registration and turnout, Negroes must constitute a substantial majority of citizens in a district in order to have a reasonable opportunity to elect a candidate of their choice. The court concluded that either a Negro population of 65% or a Negro voting age population of 60% was necessary to provide such an opportunity.

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[4] The argument that retrogression should be measured against the 1975 court-ordered plan which was in effect when the legislature adopted the statutory plan is manifestly incorrect. The mandate of the Voting Rights Act is that a plan may not be adopted if it would dilute existing Negro voting strength. There is no dispute that the 1979 court-ordered plan was the governing law at the time the court below rendered its decision. If the statutory plan were not put into effect, future elections would be conducted under the court-ordered plan. Accordingly, it is simply incorrect to suggest that Negro voting rights were not "affected" by the 1979 court-ordered plan or that a subsequent statutory plan could not dilute the rights won under that plan. To suggest, as does MR. JUSTICE STEVENS, *ante*, p. 1050, that the court-ordered plan that is now the law in Mississippi may be disregarded because the parties viewed it as a mere "backup" not only denigrates a final judgment of a federal court, entered at our direction after over a decade of litigation; it would also permit a state legislature freely to dilute Negro voting strength gained through any court-ordered plan under which elections had not yet been held. Such a result is plainly contrary to the Voting Rights Act.

It is evident from the findings of the District Court that the statutory plan significantly weakens the voting strength of Negroes in a number of ways. The statutory plan divides and diminishes Negro population concentrations, combines them with heavily white populations, and creates oddly shaped districts for no apparent reason other than to dilute the Negro vote. Under the plan presently in effect, 49 districts contain a majority of Negro voters; the statutory plan contains only 46 such districts. As the District Court acknowledged, under "the statutory plan's redistricting of Warren County, a heavy black population concentration is divided among three proposed house districts, turning a black majority into a black minority in all three districts." App. to Juris. Statement in No. 79–504, pp. 18a–19a.

The court concluded that the elimination of three majority districts was insignificant, relying on its finding that a Negro voting-age population of 60% was necessary in order for Negroes to have a fair opportunity to elect a candidate of their choice. Apparently the court reasoned that the diminution in the number of districts with a mere majority of Negro voters was not retrogressive since even under the plan presently in effect, Negro voters in those districts could not elect candidates. But a majority population gives Negroes at least some opportunity to elect a candidate of their choice; a minority gives them practically none. Indeed, in some of the counties with Negro majorities under the existing plan but not under the statutory plan, Negroes have been extremely active in city government and have a genuine opportunity to elect a candidate of their choice.[5] The District Court's mechanical application of the 60% standard eliminates that opportunity.

In a number of other districts appellee failed to carry

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[5] For example, in the Warren County district the community of Vicksburg has recently elected a Negro to the City Council. In addition, Bolton and Edwards, primarily Negro towns in the Hinds County district, have predominantly Negro city governments.

its burden of disproving retrogression within the meaning of *Beer*. In Leflore County, for example, existing law provides for a Negro voting-age population of 71.72%; the statutory plan reduces that population to 64.26%. The statutory plan fragments a heavily Negro population in that county, combining the larger portion with a white community. The record showed that because of past discrimination, Negro voting strength was severely inhibited in the county, in part because most Negroes reside in rural areas, where voter turnout is far less than in urban districts. There was testimony that a 65% Negro voting-age population substantially composed of rural Negroes was insufficient to provide a fair opportunity to elect candidates. By contrast, the 71.72% population provided by the existing plan is fully adequate.

The District Court's findings show that the statutory plan fragments a number of cohesive voting districts, combining communities where Negroes have been politically active with white populations for no discernible reason. There was uncontradicted testimony that in seven districts, the statutory plan deprives Negro voters of an opportunity to elect a candidate of their choice.[6] In these circumstances, I am unable to accept

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[6] For example, in western Hinds County, a heavily Negro district under the present law is divided into three sections, each of which is combined with greater white populations in surrounding suburbs. In Marshall County, the only district that has elected a Negro supervisor is split up, and the voting strength of Negro voters in the county's House district is diluted by the inclusion of the predominantly white Holly Springs precinct. The county's Negro voting population is thus reduced from 62% to 56%. In Adams County, the statutory plan divides the only supervisors' district with a majority Negro population into two districts. The northern portion of Adams County is then combined with heavily white populations, which reduces the Negro population from almost 70% to 63%.

The District Court altogether ignored the retrogression in the electoral strength of Negro voters within the counties. This was a serious error, for county delegations to the Mississippi Legislature play a crucial role in local government. Legislation affecting the county is enacted by a scheme

the conclusion that the statutory plan would not lead to a retrogression in the position of Negro voters.

The District Court acknowledged these differences between the two plans, but upheld the statutory plan nonetheless, concluding that the differences were insufficient to constitute a discriminatory effect. The court pointed out that both plans had the same number of districts with Negro voting-age populations of 60% or more, and it relied heavily on "the fact that legislative reapportionment is the preferred vehicle for reapportionment, as is reflected by the broader tolerances which are allowed to legislatures, but not to courts, in the matter of deviations from uniform population requirements." App. to Juris. Statement in No. 79–504, p. 32a.[7] It also relied on findings that the intervenors had not offered sufficient objections during the formulation of the statutory plan.

The District Court's reasoning amounts to a conclusion that there is a *de minimis* exception to the fundamental proposition that changes may not be made if they would produce a retrogression in the electoral potential of Negro voters. *Beer* v. *United States*, 425 U. S. 130 (1976). I am unable to dis-

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of bills of local application in the state legislature; boards of supervisors exercise little legislative power. As a result, the county delegation is largely responsible for local governance. If the statutory plan is viewed from the perspective of particular counties, it is even more difficult to account for the District Court's finding that any retrogression was "insignificant."

[7] The court also found that the State had carried its burden of proving that the statutory plan was not the product of a discriminatory intent, a conclusion that is in my view highly questionable. The unexplained discriminatory elements of the statutory plan, when combined with the State's prior history of discrimination, suggest that the State had not carried its burden. Indeed, the court entirely ignored testimony tending to show that members of the state legislature's joint reapportionment committee were aware that the statutory plan dilutes the strength of the Negro vote and that alternative configurations would preserve existing Negro population concentrations.

cern such an exception in the Voting Rights Act or in any of our decisions. Such a gloss on the Act would invite a series of changes, seemingly insignificant in themselves, which over the course of years could result in a substantial decline in Negro voting strength. Nor is the decision below justified by the principle that legislatures may deviate more broadly than courts from uniform population requirements. The Voting Rights Act flatly prohibits state legislatures from " 'undo[ing] or defeat[ing] the rights recently won' by Negroes." *Beer* v. *United States, supra,* at 140. Finally, the asserted failure of the intervenors to offer sufficient objections to the statutory plan is wholly irrelevant to the inquiry required by the Voting Rights Act. The Act's proscription on retrogression is simply not subject to waiver. The District Court's conclusion would permit a State freely to dilute Negro voting strength whenever the Negro community is unable or unwilling to participate in the apportionment process.

By today's summary affirmance, the Court permits the rights won less than a year ago, after generations of political efforts and well over a decade of litigation, to be thwarted by recalcitrant state officials. In so doing, the Court appears to condone a novel interpretation of the law that would find a *de minimis* exception to the clear and absolute requirements of the Voting Rights Act, and sanctions the application of this new doctrine to a case in which, as the record amply demonstrates, the dilution of Negro voting strength is not *de minimis* at all, but substantial. The plan approved today ensures that the Negro voters of Mississippi will not yet obtain an apportionment plan which meets the requirements of the Act. I dissent.

No. 79–555. DONNELL ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. D. C. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument.

Appeals Dismissed

No. 78–1914. UNIROYAL ENGLEBERT BELGIQUE, S. A. *v.* CONNELLY. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 75 Ill. 2d 393, 389 N. E. 2d 155.

No. 79–771. ORR *v.* ORR. Appeal from Ct. Civ. App. Ala. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 374 So. 2d 895.

No. 79–894. PARKER *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 578 S. W. 2d 755.

No. 79–925. BAKER ET AL. *v.* OREGON STATE BAR ET AL. Appeal from Ct. App. Ore. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 40 Ore. App. 133, 595 P. 2d 850.

No. 79–945. WALL *v.* VERMONT. Appeal from Sup. Ct. Vt. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 137 Vt. 482, 408 A. 2d 632.

No. 79–971. CEFALU *v.* GLOBE NEWSPAPER CO. Appeal from Ct. App. Mass. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 8 Mass. App. 71, 391 N. E. 2d 935.

No. 79–5740. WAYLAND *v.* KURTZ ET AL. Appeal from C. A. 1st Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 607 F. 2d 993.

No. 79–5777. HAYES *v.* BOARD OF TRUSTEES OF CLARK COUNTY SCHOOL DISTRICT. Appeal from Sup. Ct. Nev. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 79–533. JACKSON *v.* WHITE, ADMINISTRATOR, ET AL. Appeal from Sup. Ct. Ohio dismissed for want of substantial federal question. MR. JUSTICE WHITE and MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 59 Ohio St. 2d 6, 391 N. E. 2d 333.

No. 79–546. HOME FEDERAL SAVINGS & LOAN ASSOCIATION OF HOLLYWOOD *v.* CHEMICAL REALTY CORP. Appeal from Ct. App. N. C. dismissed for want of substantial federal question. Reported below: 40 N. C. App. 675, 253 S. E. 2d 621.

No. 79–841. BAILEY ET UX. *v.* PENNINGTON. Appeal from Sup. Ct. Del. dismissed for want of substantial federal question. Reported below: 406 A. 2d 44.

No. 79–844. FURMAN, DBA NORTHSIDE SECRETARIAL SERVICE *v.* FLORIDA BAR. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 376 So. 2d 378.

No. 79–933. PORTER *v.* PORTER. Appeal from Ct. App. Tenn. dismissed for want of substantial federal question.

No. 79–1007. HUGHES *v.* HUGHES. Appeal from Ct. Civ. App. Ala. dismissed for want of substantial federal question. Reported below: 372 So. 2d 845.

No. 79–948. NORTH RIDGE GENERAL HOSPITAL, INC., ET AL. *v.* CITY OF OAKLAND PARK ET AL. Appeal from Sup. Ct. Fla. dismissed for want of substantial federal question. Reported below: 374 So. 2d 461.

No. 79–981. MINNESOTA EDUCATION ASSN. ET AL. *v.* MINNESOTA ET AL. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 282 N. W. 2d 915.

No. 79–1023. POLYVEND, INC. *v.* PUCKORIUS ET AL. Appeal from Sup. Ct. Ill. dismissed for want of substantial federal question. Reported below: 77 Ill. 2d 287, 395 N. E. 2d 1376.

No. 79–1048. CARLSON *v.* MINNESOTA. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. Reported below: 283 N. W. 2d 516.

No. 79–992. AUSTIN MUTUAL INSURANCE CO. *v.* GUDVANGEN. Appeal from Sup. Ct. Minn. dismissed for want of substantial federal question. MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 284 N. W. 2d 813.

No. 79–5521. THOMPSON *v.* THOMPSON. Appeal from Ct. App. Md. dismissed for want of substantial federal question. MR. JUSTICE STEVENS would note probable jurisdiction and set case for oral argument. Reported below: 285 Md. 488, 404 A. 2d 269.

No. 79–5816. FIELDHOUSE ET UX. *v.* PUBLIC HEALTH TRUST OF DADE COUNTY. Appeal from Sup. Ct. Fla. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would note probable jurisdiction and set case for oral argument. Reported below: 374 So. 2d 476.

No. 79–5532. STRUBE *v.* SUMNER. Appeal from Ct. App. Ind. dismissed for want of substantial federal question. Reported below: —— Ind. App. ——, 385 N. E. 2d 948.

Certiorari Granted—Reversed in Part and Remanded. (See Nos. 78–1871 and 79–265, *ante*, p. 507.)

Certiorari Granted—Vacated and Remanded

No. 78–1005. BROWN, SECRETARY OF DEFENSE, ET AL. *v.* ALLEN ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Secretary of Navy* v. *Huff*, *ante*, p. 453. Reported below: 583 F. 2d 438.

No. 79–517. ESCHMANN BROS. & WALSH, LTD. *v.* V. MUELLER & Co. Ct. App. Colo. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *World-Wide Volkswagen Corp.* v. *Woodson*, *ante*, p. 286.

Vacated and Remanded After Certiorari Granted

No. 79–5215. IN RE OTIS ET AL. (SUBLER, PETITIONER). Ct. App. Ohio, Van Wert County. [Certiorari granted, *ante*, p. 924.] Upon consideration of motion of petitioner for summary reversal, it is ordered that the judgment be vacated and case remanded for further consideration in light of *State ex rel. Heller* v. *Miller*, 61 Ohio St. 2d 6, 399 N. E. 2d 66 (1980).

No. 79–5499. SKIPPER *v.* BRUMMER ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1012.] Upon consideration of motion of the State of Florida for reconsideration of the order of this Court entered on January 7, 1980 [*ante*, p. 1012], it is ordered that the judgment be vacated and case remanded for further consideration in light of subsequent proceedings referred to in respondent's motion for reconsideration and supplement thereto.

Miscellaneous Orders

No. A–636. CALIFORNIA *v.* BRAESEKE. Application for stay of execution and enforcement of judgment of the Supreme Court of California, presented to MR. JUSTICE REHNQUIST, and by him referred to the Court, granted pending timely filing and disposition of petition for writ of certiorari. MR. JUSTICE BRENNAN, MR. JUSTICE MARSHALL, and MR. JUSTICE STEVENS would deny the application.

No. A–644. MEAD CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. Application for stay of order of the United States District Court for the Southern District of Texas, addressed to MR. JUSTICE BRENNAN and referred to the Court, denied. MR. JUSTICE POWELL took no part in the consideration or decision of this application.

No. A–663. BUCKLEY ET AL. *v.* MCRAE ET AL. Application for stay of judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant the application.

No. 9, Orig. UNITED STATES *v.* LOUISIANA ET AL. Motion of Mississippi for entry of a supplemental decree and cross-motion of the United States referred to the Special Master. [For earlier order herein, see, *e. g.*, *ante*, p. 1029.]

No. 65, Orig. TEXAS *v.* NEW MEXICO. Motion of New Mexico to strike response of the United States denied. Alternative request to file a reply granted. Objections to Report of the Special Master on the obligations of New Mexico to Texas under the Pecos River Compact set for oral argument in due course. [For earlier order herein, see, *e. g.*, *ante*, p. 912.]

No. 73, Orig. CALIFORNIA *v.* NEVADA. Exceptions to Report of the Special Master set for oral argument in due course. The Solicitor General is invited to file a brief in this case expressing the views of the United States. [For earlier order herein, see, *e. g., ante,* p. 922.]

No. 84, Orig. UNITED STATES *v.* ALASKA. It is ordered that J. Keith Mann, Esquire, of Stanford, Cal., be appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem necessary to call for. The Master is directed to submit such reports as he may deem appropriate.

The Master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court may hereafter direct.

It is further ordered that if the position of Special Master in this case becomes vacant during a recess of the Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court. [For earlier order herein, see 442 U. S. 937.]

No. 85, Orig. TEXAS *v.* OKLAHOMA. Motion for leave to file a bill of complaint granted and the defendant shall have 60 days to answer.

No. 78–1793. ROBERTS *v.* UNITED STATES. C. A. D. C. Cir. [Certiorari granted, *ante,* p. 822.] Motion of petitioner for leave to file a supplemental brief after argument granted.

No. 78–6899. GODFREY *v.* GEORGIA. Sup. Ct. Ga. [Certiorari granted, *ante*, p. 897.] Motion of Rayfield Newlon for leave to file a brief as *amicus curiae* denied.

No. 79–1. AMERICAN EXPORT LINES, INC. *v.* ALVEZ ET AL. Ct. App. N. Y. [Certiorari granted, *ante*, p. 924.] Motion of respondent Vinal Ship Maintenance for divided argument denied.

No. 79–4. WILLIAMS ET AL. *v.* ZBARAZ ET AL.;

No. 79–5. MILLER, ACTING DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* ZBARAZ ET AL.; and

No. 79–491. UNITED STATES *v.* ZBARAZ ET AL. D. C. N. D. Ill. [Probable jurisdiction postponed, *ante*, p. 962.] Motions of Washington Legal Foundation and United States Catholic Conference for leave to file briefs as *amici curiae* granted.

No. 79–8. UNITED STATES *v.* RADDATZ. C. A. 7th Cir. [Certiorari granted, *ante*, p. 824.] Motion of the Solicitor General to permit Andrew J. Levander, Esquire, to present oral argument *pro hac vice* granted.

No. 79–48. ANDRUS, SECRETARY OF THE INTERIOR, ET AL. *v.* GLOVER CONSTRUCTION CO. C. A. 10th Cir. [Certiorari granted, *ante*, p. 962.] Motion of Association of American Indian Affairs et al. for leave to file a brief as *amici curiae* granted.

No. 79–81. COFFY *v.* REPUBLIC STEEL CORP. C. A. 6th Cir. [Certiorari granted, *ante*, p. 924.] Motion of the Solicitor General to permit Alan I. Horowitz, Esquire, to present oral argument *pro hac vice* granted.

No. 79–116. THOMAS *v.* WASHINGTON GAS LIGHT CO. ET AL. C. A. 4th Cir. [Certiorari granted, *ante*, p. 962.] Motion of the Solicitor General for divided argument granted.

No. 79–192. NEW YORK GASLIGHT CLUB, INC., ET AL. *v.* CAREY. C. A. 2d Cir. [Certiorari granted, *ante*, p. 897.] Motion of the Solicitor General for divided argument granted.

No. 79–244. UNITED STATES *v.* SALVUCCI ET AL. C. A. 1st Cir. [Certiorari granted, *ante*, p. 989.] Motions of respondents for appointment of counsel granted, and it is ordered that John C. McBride, Esquire, of Everett, Mass., be appointed to serve as counsel for respondent Zackular; and it is ordered that Willie J. Davis, Esquire, of Boston, Mass., be appointed to serve as counsel for respondent Salvucci in this case. Motions of respondents for divided argument granted.

No. 79–394. UNITED STATES *v.* WARD, DBA L. O. WARD OIL & GAS OPERATIONS. C. A. 10th Cir. [Certiorari granted, *ante*, p. 939.] Motion of Mountain States Legal Foundation et al. for leave to participate in oral argument as *amici curiae* denied.

No. 79–421. BRYANT ET AL. *v.* YELLEN ET AL.;
No. 79–425. CALIFORNIA ET AL. *v.* YELLEN ET AL.; and
No. 79–435. IMPERIAL IRRIGATION DISTRICT ET AL. *v.* YELLEN ET AL. C. A. 9th Cir. [Certiorari granted, *ante*, p. 978.] Motion of petitioners for additional time for oral argument granted, and 15 additional minutes allotted for that purpose. Respondents also allotted 15 additional minutes for oral argument.

No. 79–509. EXXON CORP. *v.* DEPARTMENT OF REVENUE OF WISCONSIN. Sup. Ct. Wis. [Probable jurisdiction noted, *ante*, p. 961.] Motion of Associated Dry Goods Corp. for leave to file a brief as *amicus curiae* granted.

No. 79–701. ROADWAY EXPRESS, INC. *v.* MONK ET AL. C. A. 5th Cir. [Certiorari granted, *ante*, p. 1012.] Joint motion to dispense with printing appendix granted.

No. 79–725. MAINE PUBLIC UTILITIES COMMISSION *v.* CENTRAL MAINE POWER CO. Sup. Jud. Ct. Me.; and

No. 79–907. INGRAM, SECRETARY, DEPARTMENT OF HUMAN SERVICES OF NEW MEXICO *v.* NOLAN. C. A. 10th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 79–972. WESTVACO CORP. ET AL. *v.* ADAMS EXTRACT CO. ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States. MR. JUSTICE POWELL took no part in the consideration or decision of this order.

No. 79–5927. BURKS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

No. 79–5888. BRADIN *v.* DAY, WARDEN. Motion for leave to file petition for writ of habeas corpus denied.

No. 79–5857. CLARK *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO; and

No. 79–5925. FORD *v.* ALDISERT, U. S. CIRCUIT JUDGE, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 79–5699. RYAN ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT. Motion for leave to file a petition for writ of mandamus denied. MR. JUSTICE STEVENS took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted or Postponed

No. 79–983. UNITED STATES *v.* WILL ET AL. Appeal from D. C. N. D. Ill. Further consideration of question of jurisdiction postponed to hearing of case on the merits. In addition to the questions presented by the statement as to jurisdiction, the parties are directed to address the effect of 28 U. S. C. § 455 on the jurisdiction of the District Court and on the jurisdiction of this Court. Reported below: 478 F. Supp. 621.

No. 79–870. UNITED STATES RAILROAD RETIREMENT BOARD *v.* FRITZ. Appeal from D. C. S. D. Ind. Motions of National Railway Conference and Railway Labor Executives' Association for leave to file briefs as *amici curiae* granted. Probable jurisdiction noted.

No. 79–1268. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE *v.* MCRAE ET AL. Application for stay of judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST would grant the application. Treating the application as a statement as to jurisdiction, probable jurisdiction noted. Appellees' request to expedite the briefing schedule granted. Opening briefs on the merits shall be filed on or before March 18, 1980. Replies thereto shall be filed on or before April 10, 1980. Case set for oral argument in tandem with No. 79–4, *Williams* v. *Zbaraz;* No. 79–5, *Miller* v. *Zbaraz;* and No. 79–491, *United States* v. *Zbaraz* [probable jurisdiction postponed, *ante,* p. 962]. Reported below: 491 F. Supp. 630.

Certiorari Granted

No 78–1841. CUYLER, CORRECTIONAL SUPERINTENDENT, ET AL. *v.* ADAMS. C. A. 3d Cir. Certiorari granted. Reported below: 592 F. 2d 720.

No. 79–770. ENVIRONMENTAL PROTECTION AGENCY *v.* NATIONAL CRUSHED STONE ASSN. ET AL.; and COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* CONSOLIDATION COAL CO. ET AL. C. A. 4th Cir. Certiorari granted. Reported below: 601 F. 2d 111 (first case); 604 F. 2d 239 (second case).

No. 79–816. POTOMAC ELECTRIC POWER CO. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, U. S. DEPARTMENT OF LABOR, ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 196 U. S. App. D. C. 417, 606 F. 2d 1324.

No. 79–927. BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM *v.* INVESTMENT COMPANY INSTITUTE. C. A. D. C. Cir. Certiorari granted. Reported below: 196 U. S. App. D. C. 97, 606 F. 2d 1004.

No. 79–938. ALLSTATE INSURANCE CO. *v.* HAGUE, PERSONAL REPRESENTATIVE OF HAGUE'S ESTATE. Sup. Ct. Minn. Certiorari granted. Reported below: 289 N. W. 2d 43.

No. 79–952. THOMAS *v.* REVIEW BOARD OF THE INDIANA EMPLOYMENT SECURITY DIVISION ET AL. Sup. Ct. Ind. Certiorari granted. Reported below: — Ind. —, 391 N. E. 2d 1127.

No. 79–567. UNITED STATES *v.* DIFRANCESCO. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 604 F. 2d 769.

No. 79–935. ALLEN ET AL. *v.* MCCURRY. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 606 F. 2d 795.

No. 79–939. DELAWARE STATE COLLEGE ET AL. *v.* RICKS. C. A. 3d Cir. Certiorari granted limited to Questions 1, 2, and 3 presented by the petition. Reported below: 605 F. 2d 710.

No. 79–5267. PEREZ *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 594 F. 2d 159.

No. 79–5602. FEDORENKO *v.* UNITED STATES. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 597 F. 2d 946.

Certiorari Denied. (See also Nos. 78–1914, 79–771, 79–894, 79–825, 79–945, 79–971, 79–5740, 79–5777, and 79–5816, *supra*.)

No. 78–1100. BROWN *v.* BLAMEY. Sup. Ct. Minn. Certiorari denied. Reported below: 270 N. W. 2d 884.

No. 78–6798. BRYAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 591 F. 2d 1161.

No. 79–419. WEAVER *v.* IOWA. Ct. App. Iowa. Certiorari denied. Reported below: 281 N. W. 2d 38.

No. 79–422. TAIBE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 591 F. 2d 1333.

No. 79–527. JOCK ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 601 F. 2d 577.

No. 79–579. ERWIN ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 602 F. 2d 1183.

No. 79–601. DRIVER ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 599 F. 2d 1056.

No. 79–613. MOSS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 604 F. 2d 569.

No. 79–650. CRUZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 603 F. 2d 673.

No. 79–654. MERLINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 1016.

No. 79–673. PROVIDENCE JOURNAL CO. *v.* FEDERAL BUREAU OF INVESTIGATION ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 602 F. 2d 1010.

No. 79–692. SCHWARTZE ET AL. *v.* WENZ ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: —— Mont. ——, 598 P. 2d 1086.

No. 79–713. MORRILTON SCHOOL DISTRICT No. 32 ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. [See also *ante*, p. 1050.] Reported below: 606 F. 2d 222.

No. 79–710. HONICKER *v.* HENDRIE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 556.

No. 79–718. VIGNOLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79–724. CORTELLESSO ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 601 F. 2d 28.

No. 79–736. SOUTH AFRICAN MARINE CORP., LTD. *v.* ELGIE & CO. C. A. 2d Cir. Certiorari denied. Reported below: 599 F. 2d 1177.

No. 79–741. SAFEWAY TRAILS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 205 U. S. App. D. C. 440, 641 F. 2d 930.

No. 79–745. CHENOWETH ET AL. *v.* NEVADA ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–747. NAVAJO TRIBE OF INDIANS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 220 Ct. Cl. 360, 601 F. 2d 536.

No. 79–748. GOLDMAN ET AL., TRUSTEES *v.* WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY. C. A. 4th Cir. Certiorari denied. Reported below: 599 F. 2d 1050.

No. 79–749. BLANCO ET UX. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 68, 602 F. 2d 324.

No. 79–750. LIBERTY NATIONAL LIFE INSURANCE CO. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1106.

No. 79–752. CERTIFIED MEATS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79–753. HOFFMAN ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 600 F. 2d 590.

No. 79–754. JONES *v.* LOUISIANA STATE BAR ASSN. Sup. Ct. La. Certiorari denied. Reported below: 372 So. 2d 1186.

No. 79–757. CUMMINS ENGINE CO., INC. *v.* CARNEY. C. A. 7th Cir. Certiorari denied. Reported below: 602 F. 2d 763.

No. 79–761. PACKARD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 79–774. LABRIOLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1292.

No. 79–779. DRYWALL TAPERS & POINTERS OF GREATER NEW YORK, LOCAL 1974, ET AL. *v.* OPERATIVE PLASTERERS' & CEMENT MASONS' INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 675.

No. 79–789. FATICO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 603 F. 2d 1053.

No. 79–791. CONSOLIDATED GAS SUPPLY CORP. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 57, 606 F. 2d 323.

No. 79–792. HIATT GRAIN & FEED, INC. *v.* BERGLAND, SECRETARY OF AGRICULTURE, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 602 F. 2d 929.

No. 79–793. HOUSTON LIGHTING & POWER CO. ET AL. *v.* INTERSTATE COMMERCE COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 224, 606 F. 2d 1131.

No. 79–799. JONES ET AL. *v.* FEDERAL ELECTION COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 131, 613 F. 2d 864.

No. 79–800. COMMITTEE TO ELECT LYNDON LaROUCHE ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 116, 613 F. 2d 849.

No. 79–801. COMMITTEE TO ELECT LYNDON LaROUCHE ET AL. *v.* FEDERAL ELECTION COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 198 U. S. App. D. C. 101, 613 F. 2d 834.

No. 79–805. COMMUNITY CASH STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 603 F. 2d 217.

No. 79–808. FREZZO BROTHERS, INC., ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 602 F. 2d 1123.

No. 79–811. CLAIBORNE HARDWARE CO. ET AL. *v.* HENRY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 595 F. 2d 291.

No. 79–823. HANSON *v.* UNITED STATES ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–829. FIRST JERSEY SECURITIES, INC., ET AL. *v.* BIUNNO, U. S. DISTRICT JUDGE (BERGEN ET AL., REAL PARTIES IN INTEREST). C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 690.

No. 79–830. VINSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 606 F. 2d 149.

No. 79–831. CROWN CENTRAL PETROLEUM CORP. *v.* PHILLIPS ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 602 F. 2d 616.

No. 79–832. DEAN *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 79–833. KONDRAT *v.* CITY OF WILLOUGHBY HILLS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 601 F. 2d 589.

No. 79–835. WILSON ET AL. *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79–839. IRONS & SEARS *v.* COMMISSIONER OF PATENTS AND TRADEMARKS. C. A. D. C. Cir. Certiorari denied. Reported below: 196 U. S. App. D. C. 308, 606 F. 2d 1215.

No. 79–840. WICKHAM CONTRACTING CO., INC., ET AL. *v.* ROBERT J. HARDER, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1000.

No. 79–842. RIVERSIDE MEMORIAL MAUSOLEUM, INC., T/A DELAWARE VALLEY MEMORIAL CENTER, ET AL. *v.* SONNENBLICK-GOLDMAN CORP. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1196.

No. 79–846. BRAMSCHER, TRUSTEE IN BANKRUPTCY *v.* ZAHN ET UX. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 323.

No. 79–858. KIRKPATRICK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 605 F. 2d 1160.

No. 79–849. SMITH'S FOOD KING *v.* RETAIL CLERKS UNION, LOCAL 1442, RETAIL CLERKS INTERNATIONAL ASSN., AFL–CIO. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–853. ELIAS ET AL. *v.* A & C DISTRIBUTING CO., INC., ET AL. Ct. App. Tenn. Certiorari denied. Reported below: 588 S. W. 2d 768.

No. 79–860. ROBERTS *v.* UPPER MILFORD TOWNSHIP ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1197.

No. 79–861. CONNELLY CONTAINERS, INC. *v.* LAKE UTOPIA PAPER, LTD. C. A. 2d Cir. Certiorari denied. Reported below: 608 F. 2d 928.

No. 79–863. GREGG *v.* U. S. INDUSTRIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 1199.

No. 79–866. JAGO, CORRECTIONAL SUPERINTENDENT *v.* SPEIGNER. C. A. 6th Cir. Certiorari denied.

No. 79–867. THOMPSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 589 S. W. 2d 897.

No. 79–868. ADOLPH COORS CO. *v.* R. E. SPRIGGS CO., INC., ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 94 Cal. App. 3d 419, 156 Cal. Rptr. 738.

No. 79–869. CHAUFFEURS, TEAMSTERS & HELPERS LOCAL 150 ET AL. *v.* SHERROD. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–872. BAILEY, ADMINISTRATRIX *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1285.

No. 79–873. LITTLE ROCK NEWSPAPERS, INC. *v.* DODRILL. Sup. Ct. Ark. Certiorari denied. Reported below: 265 Ark. 628, 590 S. W. 2d 840.

No. 79–875. SHUI PING WU ET AL. *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 43 Md. App. 109, 403 A. 2d 819.

No. 79–877. LORCH ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 605 F. 2d 657.

No. 79–878. WESTMORELAND HOSPITAL ASSN. ET AL. *v.* BLUE CROSS OF WESTERN PENNSYLVANIA. C. A. 3d Cir. Certiorari denied. Reported below: 605 F. 2d 119.

No. 79–879. TRACY, JUDGE *v.* GOLSTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 603 F. 2d 225.

No. 79–887. TERRY *v.* INDIANA SUPREME COURT DISCIPLINARY COMMISSION. Sup. Ct. Ind. Certiorari denied. Reported below: — Ind. —, 394 N. E. 2d 94.

No. 79–888. BILLINGSLEY ET UX. *v.* MOORE ET AL. Ct. Sp. App. Md. Certiorari denied.

No. 79–889. ROMEROS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 600 F. 2d 1104.

No. 79–890. LAMERS DAIRY, INC., ET AL. *v.* SECRETARY OF AGRICULTURE. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–893. ROY ET UX. *v.* ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 71 App. Div. 2d 815, 418 N. Y. S. 2d 913.

No. 79–895. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 638 F. 2d 1161.

No. 79–898. EDGAR ET UX. *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Reported below: 92 Wash. 2d 217, 595 P. 2d 534.

No. 79–905. JOSIAH *v.* GOVERNMENT OF THE VIRGIN ISLANDS;

No. 79–916. RIVERA *v.* GOVERNMENT OF THE VIRGIN ISLANDS; and

No. 79–5734. RIOS *v.* GOVERNMENT OF THE VIRGIN ISLANDS. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79-906. RANCHO LA COSTA, INC., DBA LA COSTA COUNTRY CLUB *v.* ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 79-909. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79-911. KOEHL, ADMINISTRATOR, ET AL. *v.* UNITED STATES FIRE INSURANCE CO. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 79-918. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-919. WHISKERS ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 600 F. 2d 1332.

No. 79-922. GOULD *v.* GAVETT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 591 F. 2d 1339.

No. 79-931. HAYES ET AL. *v.* SOLOMON ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 597 F. 2d 958.

No. 79-940. DE TOLEDANO *v.* NADER. Ct. App. D. C. Certiorari denied. Reported below: 408 A. 2d 31.

No. 79-942. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79-946. RAMEY *v.* RAMEY. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 680, 258 S. E. 2d 883.

No. 79-947. CALHOUN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 647.

No. 79-950. SAVERSLAK, TRUSTEE *v.* DAVIS-CLEAVER PRODUCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 208.

No. 79–954. SHANAHAN *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 404 A. 2d 975.

No. 79–957. PANARELLA *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 783, 399 N. E. 2d 952.

No. 79–961. AMBASSADOR COLLEGE *v.* GOETZKE. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 322, 260 S. E. 2d 27.

No. 79–964. HIXSON *v.* ARKANSAS. Ct. App. Ark. Certiorari denied. Reported below: 266 Ark. 778, 587 S. W. 2d 70.

No. 79–966. LYKOS ET AL. *v.* AMERICAN HOME ASSURANCE CO. C. A. 7th Cir. Certiorari denied. Reported below: 609 F. 2d 314.

No. 79–967. FLOYD *v.* ALABAMA. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 280.

No. 79–968. COUGHENOUR *v.* MILLS. Ct. Sp. App. Md. Certiorari denied.

No. 79–970. LLINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 506.

No. 79–976. FALSTAFF BREWING CORP. *v.* LOCAL No. 153, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 501.

No. 79–977. NEILSON ET AL. *v.* WYOMING. Sup. Ct. Wyo. Certiorari denied. Reported below: 599 P. 2d 1326.

No. 79–982. ROBERTS, ATTORNEY GENERAL OF RHODE ISLAND *v.* NARRAGANSETT ELECTRIC CO. Sup. Ct. R. I. Certiorari denied. Reported below: —— R. I. ——, 404 A. 2d 821.

No. 79–985. SEWELL *v.* PHILLIPS PETROLEUM CO. C. A. 10th Cir. Certiorari denied. Reported below: 606 F. 2d 274.

No. 79–987. JONES ET AL. *v.* WOLF ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 388, 260 S. E. 2d 84.

No. 79–988. KRAUSE ET AL. *v.* CITY OF BRUNSWICK ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 244 Ga. 395, 260 S. E. 2d 348.

No. 79–990. CAMPBELL *v.* DISCIPLINARY BOARD OF THE WASHINGTON STATE BAR ASSN. Sup. Ct. Wash. Certiorari denied.

No. 79–993. JACKSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 607 F. 2d 1219.

No. 79–995. AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES (AFL–CIO) *v.* GALE, JUDGE. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 366 So. 2d 901.

No. 79–997. LIBRACH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 919.

No. 79–998. GLICKMAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 625.

No. 79–999. FLORIDA EAST COAST RAILROAD CO. *v.* DEPARTMENT OF REVENUE OF FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 378 So. 2d 344.

No. 79–1001. SHUFFMAN, EXECUTRIX *v.* HARTFORD TEXTILE CORP. ET AL. C. A. 2d Cir. Certiorari denied.

No. 79–1002. MARCHIONDO *v.* TRAUB, JUDGE. Sup. Ct. N. M. Certiorari denied.

No. 79–1004. STUYVESANT INSURANCE CO. *v.* MASSACHUSETTS. Ct. App. Mass. Certiorari denied. Reported below: 8 Mass. App. 871, 391 N. E. 2d 277.

No. 79–1008. ILLINOIS *v.* BISHOP. App. Ct. Ill., 5th Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 52, 388 N. E. 2d 1144.

No. 79–1010. SIEBERT *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 895, 390 N. E. 2d 1322.

No. 79–1011. RANDELL *v.* BANZHOFF. Sup. Ct. Ala. Certiorari denied. Reported below: 375 So. 2d 445.

No. 79–1012. LASHMETT *v.* ILLINOIS. App. Ct. Ill., 4th Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 429, 389 N. E. 2d 888.

No. 79–1021. GRANVILLE CENTRAL SCHOOL DISTRICT ET AL. *v.* THOMAS ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 1043.

No. 79–1026. VAHALIK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 99.

No. 79–1032. REFRIGERATED FOOD LINE, ET AL. *v.* REPUBLIC INDUSTRIES, INC., ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 412.

No. 79–1034. PANKO *v.* RODAK, CLERK OF U. S. SUPREME COURT, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 606 F. 2d 168.

No. 79–1037. STOCKTON & HING *v.* EVANS, TRUSTEE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 1243.

No. 79–1046. SMITH *v.* SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–1052. PRICE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 819.

No. 79–1054. POE *v.* KING, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 79–1066. FUSELIER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79–1081. DRESSEL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 611 F. 2d 801.

No. 79–1083. PRIDE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79–1086. FOSHEE ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 111.

No. 79–1089. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 606 F. 2d 320.

No. 79–1095. JIZMEJIAN *v.* DEPARTMENT OF AIR FORCE. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1001.

No. 79–1113. SCOTT *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–1114. CARY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 612 F. 2d 575.

No. 79–1118. GLEASON *v.* UNITED STATES; and
No. 79–1125. LUFTIG *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 616 F. 2d 2.

No. 79–1131. AWERKAMP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 560.

No. 79–5440. FOLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 605 F. 2d 564.

No. 79–5483. SOSA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 579 S. W. 2d 937.

No. 79–5519. GREEN *v.* WHITE, TRAINING CENTER SUPERINTENDENT. C. A. 8th Cir. Certiorari denied. Reported below: 605 F. 2d 376.

No. 79–5522. BROWN *v.* UNITED STATES;
No. 79–5579. PARSONS *v.* UNITED STATES; and
No. 79–5580. CALDWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: No. 79–5522, 605 F. 2d 1197; No. 79–5579, 605 F. 2d 1198; No. 79–5580, 605 F. 2d 1197.

No. 79–5537. WALKER *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 599 F. 2d 448.

No. 79–5540. HEATH *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 503.

No. 79–5550. DICKINSON *v.* GOLDEN ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5557. GOODE *v.* MARKLEY, WARDEN, ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 195 U. S. App. D. C. 391, 603 F. 2d 973.

No. 79–5560. BAILEY *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 273 S. C. 467, 257 S. E. 2d 231.

No. 79–5566. TAYLOR *v.* HOOPER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 596 F. 2d 1284.

No. 79–5578. FIORENTINO *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 221 Ct. Cl. 545, 607 F. 2d 963.

No. 79–5583. PERRY *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5590. MAYFIELD *v.* MOHN, PENITENTIARY SUPERINTENDENT. Sup. Ct. App. W. Va. Certiorari denied.

No. 79–5613. HOUGH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 619.

No. 79–5614. JACOBS *v.* SMITH, SUPERINTENDENT, MARYLAND STATE POLICE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1202.

No. 79–5619. MOREL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 502.

No. 79–5623. MCCLANAHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 808.

No. 79–5625. BROWN *v.* NEW MEXICO. Ct. App. N. M. Certiorari denied. Reported below: 93 N. M. 236, 599 P. 2d 389.

No. 79–5629. ALCORTA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 859.

No. 79–5641. ENRIQUEZ-SANCHEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 604 F. 2d 1184.

No. 79–5642. HATCHER *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied.

No. 79–5647. LAWRENCE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1321.

No. 79–5650. FRAZIER *v.* LANE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d. 372.

No. 79–5652. BELVIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 294.

No. 79–5655. FLORES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 598 F. 2d 995.

No. 79–5657. HILL *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 404 A. 2d 525.

No. 79–5659. MONTALALOU *v.* SUPERINTENDENT, CLINTON CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 997.

No. 79–5665. JOHNSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 79–5674. HUBER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 79–5677. COYLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 374.

No. 79–5679. PATTERSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1008.

No. 79–5680. VITAGLIANO *v.* UNITED STATES ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 601 F. 2d 73.

No. 79–5681. YOUNG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 79–5683. JONES ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 269.

No. 79–5702. FIGUEROA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 609 F. 2d 642.

No. 79–5719. CALFON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 607 F. 2d 29.

No. 79–5728. ROSS *v.* CAREY, GOVERNOR OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79–5733. JONES ET UX. *v.* GEORGIA-PACIFIC CORP. C. A. 5th Cir. Certiorari denied. Reported below: 604 F. 2d 669.

No. 79–5732. WOLFEL *v.* JAGO, CORRECTIONAL SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 595 F. 2d 1227.

No. 79–5736. JOHNSON *v.* HILTON, PRISON SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 609 F. 2d 502.

No. 79–5737. JOHNSON *v.* MARYLAND. Ct. Sp. App. Md. Certiorari denied.

No. 79–5738. SIMS *v.* ROWE, CORRECTIONS DIRECTOR, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 607 F. 2d 1007.

No. 79–5739. BRICE *v.* DAY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 604 F. 2d 664.

No. 79–5745. HAILS *v.* SMITH, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied.

No. 79–5746. TRAYLOR *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 79–5751. HUDSON *v.* BLACKBURN, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 601 F. 2d 785.

No. 79–5752. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 608 F. 2d 1004.

No. 79–5753. RUSSO *v.* SUPREME COURT OF NEW YORK, KINGS COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 614 F. 2d 1290.

No. 79–5754. GINSBURG *v.* OVERLOOK HOSPITAL ET AL. Sup. Ct. N. J. Certiorari denied.

No. 79–5755. SOLOMON *v.* FRAME ET AL. Sup. Ct. App. W. Va. Certiorari denied.

No. 79–5757. WILKERSON *v.* BLAKENSHIP, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 512.

No. 79–5761. OSVALDO M. *v.* CITY OF NEW YORK; JOSE L. *v.* CITY OF NEW YORK; and WALTER B. *v.* CITY OF NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 48 N. Y. 2d 603, 396 N. E. 2d 207 (first and third cases); 48 N. Y. 2d 633, 396 N. E. 2d 478 (second case).

No. 79–5764. BLAKE *v.* WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION OF FLORIDA. C. A. 5th Cir. Certiorari denied. Reported below: 603 F. 2d 858.

No. 79–5767. FLOYD *v.* JACKSONVILLE SHIPYARDS, INC., ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5773. SAWAYA *v.* BERNALILLO COUNTY ASSESSOR. Ct. App. N. M. Certiorari denied.

No. 79–5774. WASILOWSKI *v.* NEW JERSEY. Super. Ct. N. J. Certiorari denied.

No. 79–5776. GORE *v.* LEEKE, CORRECTIONS COMMISSIONER, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 741.

No. 79–5783. GAMEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5785. MCPHERSON *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 373.

No. 79–5789. MOORE *v.* CLEMENTS, SHERIFF. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79–5792. FOSTER *v.* SOUTH SUBURBAN SAFEWAY LINES, INC. Sup. Ct. Ill. Certiorari denied.

No. 79–5793. JOHNSON *v.* KOEHLER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 79–5797. BUSTILLO *v.* WILKINSON, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 79–5798. BERRY *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied.

No. 79–5799. MOORE *v.* MITCHELL, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 607 F. 2d 1002.

No. 79–5800. RINEHART *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. Reported below: 283 N. W. 2d 319.

No. 79–5801. TAYLOR *v.* GARRISON. C. A. 4th Cir. Certiorari denied. Reported below: 609 F. 2d 510.

No. 79–5802. CLARK *v.* PAYNE ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5803. SIMMONS *v.* McDANIEL ET AL. C. A. 8th Cir. Certiorari denied.

No. 79–5807. NEWTOP *v.* MERIT SYSTEMS PROTECTION BOARD. C. A. 9th Cir. Certiorari denied.

No. 79–5811. STUART *v.* PONDER, JUDGE. Sup. Ct. Ark. Certiorari denied.

No. 79–5812. SHEPTIN *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5813. COLE *v.* RANDLES ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5814. KNOWLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 79–5815. CONNER *v.* OHIO. Ct. App. Ohio, Cuyahoga County. Certiorari denied.

No. 79–5818. MILLER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: —— Ind. ——, 392 N. E. 2d 445.

No. 79–5819. REED *v.* SCHWAB ET AL. Sup. Ct. Ore. Certiorari denied. Reported below: 287 Ore. 411, 600 P. 2d 387.

No. 79–5822. PAIGE *v.* BROOKS, ATTORNEY GENERAL OF NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1309.

No. 79–5824. PRENZLER *v.* PIKE ET AL. C. A. 9th Cir. Certiorari denied.

No. 79–5827. AYALA-CARAPIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–5828. HOLSEY *v.* WATKINS, U. S. DISTRICT JUDGE. C. A. 4th Cir. Certiorari denied. Reported below: 605 F. 2d 1202.

No. 79–5829. KENNEDY *v.* OHIO. Ct. App. Ohio, Warren County. Certiorari denied.

No. 79–5832. FITZPATRICK *v.* WARD. C. A. 2d Cir. Certiorari denied.

No. 79–5833. HANNON *v.* MAINE. Sup. Jud. Ct. Me. Certiorari denied. Reported below: 395 A. 2d 118.

No. 79–5834. CLARK *v.* UNITED STATES; and
No. 79–5896. ARTEZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 521.

No. 79–5836. WINFIELD *v.* VAN MALE BUICK, INC., ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 71 Ill. App. 3d 1114, 392 N. E. 2d 1387.

No. 79–5843. LITTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 608 F. 2d 296.

No. 79–5845. CARTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 79–5847. SIMMONS *v.* EGELER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 605 F. 2d 557.

No. 79–5848. BEARDSLEE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 609 F. 2d 914.

No. 79–5850. RABAGO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 79–5852. ZUNIGA *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 70 Ill. App. 3d 1103, 392 N. E. 2d 801.

No. 79–5854. CRAWFORD *v.* DIAL, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied.

No. 79–5855. BROWN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 814.

No. 79–5856. OWEN *v.* HEYNE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 605 F. 2d 559.

No. 79–5859. WHITE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 69 Ill. App. 3d 830, 387 N. E. 2d 728.

No. 79–5862. HAYDEN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 586 S. W. 2d 720.

No. 79–5865. WAGNER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 375.

No. 79–5866. DORTCH *v.* FENTON, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 79–5868. MOORE *v.* MEDICAB OF MICHIGAN, INC., ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5869. TONEY, DBA TRADEWINDS LTD., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 605 F. 2d 200.

No. 79–5870. COLE *v.* LANE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

No. 79–5874. LAWSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 608 F. 2d 1129.

No. 79–5875. MOORE *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 72 Ill. App. 3d 462, 391 N. E. 2d 139.

No. 79–5880. LANG *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 79–5881. WILSON *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Reported below: 610 F. 2d 820.

No. 79–5882. OPDAHL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 490.

No. 79–5884. GONZALEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 614 F. 2d 774.

No. 79–5887. LIVINGSTONE *v.* LITTLE, BROWN & CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 610 F. 2d 812.

No. 79–5889. SHAPIRO ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5890. YAPLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 608 F. 2d 1375.

No. 79–5891. JOHNSON *v.* CARTER, PRESIDENT OF THE UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 612 F. 2d 581.

No. 79–5907. MCDONALD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 612 F. 2d 1311.

No. 79–5912. KAEWNIL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5913. HOLLIDAY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 823.

No. 79–5914. HUMBEL *v.* FOLTZ, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 611 F. 2d 372.

No. 79–5922. LAJUNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 610 F. 2d 822.

No. 79–5923. KARSKY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 610 F. 2d 548.

No. 79–5924. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 607 F. 2d 1005.

No. 79–5928. GAMBLE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 607 F. 2d 820.

No. 79–5955. MAHLER *v.* NELSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5960. ADAM ET AL. *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 408 A. 2d 313.

No. 79–5963. NELSON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 618 F. 2d 109.

No. 79–5967. LYONS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 609 F. 2d 1338.

No. 79–5972. NOLEN *v.* DEPARTMENT OF HUMAN RESOURCES OF GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 151 Ga. App. 455, 260 S. E. 2d 353.

No. 79–5981. RIVERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 608 F. 2d 1028.

No. 79–5986. MAHLER *v.* NELSON, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 610 F. 2d 806.

No. 79–5990. TAYLOR *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 612 F. 2d 1272.

No. 79–88. CALIFORNIA *v.* WHYTE. Ct. App. Cal., 1st App. Dist. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 90 Cal. App. 3d 235, 152 Cal. Rptr. 280.

No. 79–920. WHITE, TRAINING CENTER SUPERINTENDENT *v.* GREEN. C. A. 8th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 605 F. 2d 376.

No. 79–934. PENNSYLVANIA *v.* STARR. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 486 Pa. 530, 406 A. 2d 1017.

No. 79–943. MICHIGAN *v.* GARDNER. Sup. Ct. Mich. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 406 Mich. 369, 279 N. W. 2d 785.

No. 79–427. BERKEY PHOTO, INC. *v.* EASTMAN KODAK CO.; and

No. 79–499. EASTMAN KODAK CO. *v.* BERKEY PHOTO, INC. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACKMUN would grant certiorari and set cases for oral argument. Reported below: 603 F. 2d 263.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

An obviously carefully considered opinion of the Court of Appeals comprising 99 pages in a separate appendix to the petition for certiorari in this case, dealing as it does with the complexities, refinements, and contradictions embodied in the decisional law construing §§ 1 and 2 of the Sherman Act is obviously not an attractive candidate for review under our discretionary certiorari jurisdiction. Nonetheless, I do not

think we may "let this cup pass from us" unless we are prepared to forgo the opportunity to review some propositions enunciated by the Court of Appeals in this case which strike me as little less than bizarre.

One of the principal issues decided by the Court of Appeals was the obligation of respondent and cross-petitioner Kodak to "predisclose" information about its camera and film system to competing camera manufacturers prior to offering such camera and film for sale to the public. As to the camera market issues, the Court of Appeals held that Kodak had no such obligation, but as to the photofinishing and photofinishing equipment markets, the Court of Appeals held that Kodak violated § 2 of the Sherman Act by using its market power over films and cameras to obtain a competitive advantage with respect to photofinishing and photofinishing equipment. 603 F. 2d 263, 279–285, 304. And as to the joint development project, the court held that Kodak violated § 1 of the Sherman Act by including in the agreement a nondisclosure provision, even though Kodak made an investment of millions of dollars in the project that presumably was essential to its success.

To one not schooled in the niceties of antitrust litigation, the notion that a statute designed to foster competition requires one competitor to disclose to another, in advance of marketing a product to the general public, its plan to introduce the new product, is difficult to fathom. And this Court has held as recently as *United States* v. *Grinnell Corp.*, 384 U. S. 563 (1966), that it is not a violation of § 2 of the Sherman Act for a business with monopoly power to achieve "growth or development as a consequence of a superior product, business acumen, or historic accident." 384 U. S., at 570–571. I should think this reasoning is equally applicable to the alleged violation of § 1 of the Sherman Act which the Court of Appeals also dealt with in its opinion.

But the Court of Appeals in this case held that "the rule of *Grinnell* must be read together with the teaching of *Griffith* [*United States* v. *Griffith*, 334 U. S. 100, 107 (1948)], that the mere existence of monopoly power 'whether lawfully or unlawfully acquired,' is in itself violative of § 2, 'provided it is coupled with the purpose or intent to exercise that power,'" 603 F. 2d, at 274, even though this Court in *Grinnell* did not express a similar limitation on its holding.

One can understand the exasperation revealed by the statement in the opinion of the Court of Appeals that "[d]espite the daunting complexity of the case—the exhibits numbered in the thousands—Kodak demanded a jury." *Id.*, at 268. The trial lasted from July 1977 until March 1978, and since Kodak is entitled as a matter of constitutional right under the Seventh Amendment to demand a jury trial in a case such as this, perhaps the "daunting complexity" of the case—and presumably many other similar cases being litigated in other federal courts—suggests that either the forest is being lost sight of because of the trees, or that an Act of Congress has been battered, tortured, and encrusted with layer after layer of refinement not required by any necessary construction of the Act, but by the results wrought by a century of case-by-case adjudication of it in this Court and other federal courts.

If the Sherman Act requires "predisclosure" by one competitor to another before a new product can be marketed, I think that the raised eyebrows resulting from such a holding should come from this Court, and not from extrapolations by other federal courts of the decisions of this Court interpreting the Sherman Act. I likewise think that the conclusion of the Court of Appeals that significant parts of a defendant's conduct which take place before the statute of limitations period may nonetheless be introduced in evidence is open to serious question under our prior cases.

So long as there are institutes for federal judges concerning the management of complex cases, and judicial panels for

handling multidistrict litigation, this Court cannot remain wholly above the battle. In this case, it is conceded that the claimed antitrust violations all arise directly from Kodak's competitive superiority and technological innovation leading to the development of new products that consumers consider to be desirable. Because I believe that all three of these violations are interrelated, I would grant the petitions for certiorari and limit the questions as follows: (1) Was Kodak's introduction of the 110 camera and Kodacolor II film system either an attempt to monopolize or actual monopolization of the camera market in violation of § 2 of the Sherman Act? (2) Did Kodak violate § 2 of the Sherman Act by impermissibly using its film monopoly as "leverage" to enhance its position in the photofinishing and photofinishing equipment markets? And (3) did Kodak's joint development agreements with General Electric and Sylvania violate § 1 of the Sherman Act? I would also grant certiorari on this question raised in the conditional cross-petition: "Did the court of appeals err in not entering judgment for Kodak on the film and color print paper claims, and instead remanding both claims for a determination of whether 'conduct occurring many years before the commencement of suit contributed to an overcharge . . . within the limitations period'?"

No. 79-485. ELI LILLY & CO. *v.* COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. 1st Cir. Certiorari denied. Reported below: 598 F. 2d 637.

MR. JUSTICE REHNQUIST, with whom MR. JUSTICE POWELL joins, dissenting.

This case presents an issue of great importance, which cannot help but become greater as time goes on and more and more administrative proceedings are conducted either directly under the Administrative Procedure Act, 5 U. S. C. § 553, or similar provisions in new Acts of Congress for review of agency action. That question is the degree to which an agency, which publishes a rule for notice and comment under

§ 4 of the Administrative Procedure Act and very substantially changes the rule in response to the comments it receives, is obliged to publish the revised rule to allow another opportunity for notice and comment. In deciding this case, the Court of Appeals for the First Circuit was fully aware of the problems that could result from a complete "about face" by the administrative agency, see *BASF Wyandotte Corp.* v. *Costle*, 598 F. 2d 637 (1979), as can be seen from this portion of the first paragraph of its opinion concluding that the respondent *had* complied with the Administrative Procedure Act:

> "Petitioners' first complaint is that EPA failed to comply with the requirements of the Administrative Procedure Act in that the final regulations were so different from the interim final regulations that the interims were not notice of 'either the terms or substance of the proposed rule or a description of the subjects and issues involved.' 5 U. S. C. § 553 (b)(3). This requirement is a *critical* one because it supports the assumption we make with regard to EPA's substantive decisions that those decisions are in fact the product of informed, expert reasoning tested by exposure to diverse public comment." *Id.*, at 641 (emphasis supplied).

Petitioner claims that the differences between the effluent limitations imposed in the original regulations and the ones finally promulgated were so great as to make impossible any such judgment by a reviewing court in the absence of further opportunity for notice and comment on the revised regulations. The Court of Appeals' conclusion to the contrary is a carefully reasoned one, and I am not at this point willing to say that I disagree with it. But when we consider the very significant effects that a "rulemaking" procedure may have upon the parties involved, see *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224, 244–245 (1973), I think this Court should grant certiorari to examine the question. It is the sort of question upon which there will never be a

"square conflict" among the various Courts of Appeals, since the differences between the originally promulgated regulations and the finally promulgated regulations will necessarily be ones of degree. Thus, one need not accept at full face value the contention of petitioner that the Court of Appeals' decision squarely conflicts with decisions from the Courts of Appeals for the Second, Fourth, and District of Columbia Circuits in order to realize that the question is a recurring one that will ultimately require interpretation of important statutory language by this Court. Accordingly, I would grant the petition limited to the question whether § 4 of the Administrative Procedure Act, 5 U. S. C. § 553, required EPA to provide an additional opportunity to comment on the final regulations proposed here.

No. 79–539. MAINE *v.* DANA ET AL. Sup. Jud. Ct. Me. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 404 A. 2d 551.

No. 79–955. DEHAVILLAND AIRCRAFT OF CANADA, LTD. *v.* BETAR, PUBLIC ADMINISTRATOR OF COOK COUNTY, ET AL. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE and MR. JUSTICE BLACKMUN would grant certiorari. Reported below: 603 F. 2d 30.

No. 79–633. COUNTY OF VENTURA *v.* CASTRO. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 93 Cal. App. 3d 462, 156 Cal. Rptr. 66.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE REHNQUIST joins, dissenting.

I believe that this case presents the substantial question whether the ruling of the California Court of Appeal is consistent with this Court's decision in *D. H. Overmyer Co.* v. *Frick Co.*, 405 U. S. 174 (1972). See also *Isbell* v. *County of Sonoma*, 21 Cal. 3d 61, 577 P. 2d 188, cert. denied as out of time, 439 U. S. 996 (1978).

The case concerns an agreement of paternity signed by the alleged father of the unborn child of a welfare recipient. The mother-to-be applied for welfare assistance and informed county employees that respondent was the father of her unborn child. At the request of the District Attorney's office, respondent came to that office and spoke with Juanita Hickman, a family support officer.

Although respondent expressed some doubts, he told Hickman that "more than likely I am the father." Hickman explained to respondent that he could sign an agreement of paternity which would be filed in court and which would result in a judgment of paternity and an order to pay child support. He was advised, alternatively, that if he was not certain he was the father, the office would institute a paternity action and serve him with a summons and complaint; he then would have 30 days to answer and a trial would follow. Respondent signed a paternity agreement, prepared by Hickman. It was filed with the Ventura County Superior Court. The pertinent part of the agreement read:

> "It is hereby agreed by plaintiff, through C. STANLEY TROM, District Attorney for the County of Ventura, and Rudy Castro, Jr., defendant, that the following facts are true and that a judgment be entered against the defendant in accordance with this agreement.
>
> "1. Defendant acknowledges that the District Attorney of Ventura County, does not represent him and that he understands that he has had an opportunity to have an attorney advise and represent him in this matter.
>
> "2. Defendant understands that a judgment for child support will be entered against him based upon this agreement.
>
> "3. The defendant is the father of: unborn child of Viola Gonzales, due to be born December 1977.
>
> "4. The defendant agrees to pay $125.00 per child per month commencing on Sept. 1, 1977, and on the same date

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each month thereafter until termination by operation of law or further order of court."

Six months after entry of judgment, respondent moved to set aside the agreement and judgment on the grounds that he had signed the agreement out of fear that he would be criminally prosecuted, that he did not realize all the rights he was giving up, such as the right to discovery and blood tests of the mother and child, and that he did not know he would be liable for child support until the child reached the age of 18 years. The Superior Court denied the motion. The California Court of Appeal reversed. 93 Cal. App. 3d 462, 156 Cal. Rptr. 66 (1979).

The signed agreement was authorized by § 11476.1 of Cal. Welf. & Inst. Code Ann. (West Supp. 1973–1978). That section reads as set forth in the margin.*

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*"In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the noncustodial parent, on behalf of the custodial parent, a minor child, or children, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. The provisions of Civil Code Section 4702 shall apply to such judgment. The district attorney shall be directed to effect service upon the obligor of a copy of the judgment and notify the obligor in writing of the right to seek modification of the amount of child support order upon a showing of changes of circumstances and upon such showing the court shall immediately modify the order and set the amount of child support payment pursuant to § 11350, and to promptly file proof of service thereof.

"For the purposes of this section, in making a determination of the noncustodial parent's reasonable ability to pay, the following factors shall be considered:

"(a) The standard of living and situation of the parties;

"(b) The relative wealth and income of the parties;

"(c) The ability of the noncustodial parent to earn;

Although the Court of Appeal commented on the facts of the particular case, and the likelihood that there had been no knowing and voluntary waiver of due process rights, the court found § 11476.1 unconstitutional on its face. The statute was declared defective because it does not make adequate provision for the protection of due process rights of the noncustodial parent and it does not address the manner in which the defendant may waive those rights. "Glaringly absent," 93 Cal. App. 3d., at 469, 156 Cal. Rptr., at 70, was a requirement that the defendant be informed of his right to trial. The court also based its decision on the absence of any provision for prejudgment judicial determination of the voluntariness of a waiver of due process rights and on the disparity of bargaining power between petitioner and respondent.

In *Overmyer* this Court stated that "a cognovit clause is not, *per se*, violative of Fourteenth Amendment due process." 405 U. S., at 187. We emphasized the need to consider the facts of each situation. *Id.*, at 178, 187–188. While one may sympathize with respondent's position, the Court of Appeal's declaration that the California statute is unconstitutional on its face, as violative of the Fourteenth Amendment, appears to contravene the case-by-case approach of *Overmyer*. We indicated in *Overmyer*, *id.*, at 188, that a different result might follow where there is great disparity in bargaining power between the parties, but that question never has been decided specifically by the Court. See *Swarb* v. *Lennox*, 405 U. S. 191 (1972). Because the issue is bound to recur, I would grant the petition for certiorari and set the case for argument.

"(d) The ability of the custodial parent to earn;

"(e) The needs of the custodial parent and any other persons dependent on such person for their support;

"(f) The age of the parties;

"(g) Any previous court order imposing an obligation of support."

No. 79–782. MISSISSIPPI POWER & LIGHT CO. ET AL. *v.* UNITED STATES NUCLEAR REGULATORY COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 601 F. 2d 223.

No. 79–796. AMAREX, INC. *v.* FEDERAL ENERGY REGULATORY COMMISSION ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 603 F. 2d 127.

No. 79–788. DIANA ET AL. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE MARSHALL would grant certiorari. Reported below: 605 F. 2d 1307.

No. 79–837. MILLER BREWING CO. *v.* JOS. SCHLITZ BREWING CO. C. A. 7th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 605 F. 2d 990.

No. 79–848. DONOFRIO ET AL. *v.* MARSHALL, SECRETARY OF LABOR. C. A. 3d Cir. Certiorari denied. MR. JUSTICE POWELL would grant certiorari. Reported below: 605 F. 2d 1196.

No. 79–897. STOSKUS, ADMINISTRATRIX *v.* CITY OF BALDWIN PARK ET AL. C. A. 9th Cir. Motion to substitute Frances Stoskus, Administratrix of the Estate of Bertha Stoskus, in place of Bertha Stoskus, deceased, granted. Certiorari denied. Reported below: 605 F. 2d 563.

No. 79–5765. JARZAB *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE would grant certiorari. Reported below: 123 Ariz. 308, 599 P. 2d 761.

No. 79–5849. HAUGHTON *v.* HAUGHTON, SPECIAL ADMINISTRATOR. Sup. Ct. Ill. Motion of respondent for damages and certiorari denied. Reported below: 76 Ill. 2d 439, 394 N. E. 2d 385.

No. 79–5705. STANLEY *v.* ZANT, SUPERINTENDENT, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER. Sup. Ct. Ga.;

No. 79–5714. THOMAS *v.* ZANT, WARDEN. Sup. Ct. Ga.;

No. 79–5744. ALDERMAN *v.* BALKCOM, WARDEN. Sup. Ct. Ga.;

No. 79–5830. BOWDEN *v.* ZANT, WARDEN. Sup. Ct. Ga.; and

No. 79–5861. COPPOLA *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: No. 79–5830, 244 Ga. 260, 260 S. E. 2d 465; No. 79–5861, 220 Va. 243, 257 S. E. 2d 797.

MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Granted. (See No. 78–1780, *ante*, p. 505.)

Rehearing Denied

No. 78–6687. RUFFIN *v.* GEORGIA, *ante*, p. 995;

No. 79–444. FERNOS-LOPEZ *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO ET AL., *ante*, p. 931;

No. 79–479. GENINS *v.* GEIGER ET UX., *ante*, p. 991;

No. 79–525. MOENCKMEIER *v.* UNITED STATES ET AL., *ante*, p. 991;

No. 79–535. LAMPKIN-ASAM *v.* SUPREME COURT OF FLORIDA, *ante*, p. 1013;

No. 79–560. VISLISEL *v.* UNITED STATES DEPARTMENT OF LABOR ET AL., *ante*, p. 1014;

No. 79–630. HUNT ET AL. *v.* COASTAL STATES GAS PRODUCING CO. ET AL., *ante*, p. 992;

No. 79–699. HEYNE *v.* HEYNE ET AL., *ante*, p. 1008; and

No. 79–712. ASH ET UX. *v.* TRUSTEES FOR WESTGATE-CALIFORNIA CORP., *ante*, p. 1015. Petitions for rehearing denied.

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No. 79–5562. CHODOS *v.* FEDERAL BUREAU OF INVESTIGATION, *ante*, p. 1021;

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No. 79–5616. JOHNS *v.* WOODBRIDGE TOWNSHIP ET AL., *ante*, p. 1022;

No. 79–5621. BRETZ *v.* MONTANA, *ante*, p. 994;

No. 79–5632. ROACH *v.* SOUTH CAROLINA, *ante*, p. 1026;

No. 79–5636. GAINES *v.* MERCHANTS NATIONAL BANK & TRUST COMPANY OF INDIANAPOLIS, *ante*, p. 1023;

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No. 79–5696. KENNEDY *v.* INDIANA, *ante*, p. 1047. Petitions for rehearing denied.

No. 78–6694. THIESS *v.* FRANKLIN SQUARE HOSPITAL, INC., ET AL., *ante*, pp. 851 and 975; and

No. 79–5030. SANDERS ET AL. *v.* HANKINS ET AL., *ante*, pp. 872 and 975. Motions for leave to file second petitions for rehearing denied.

No. 79–177. JACKA *v.* UNITED STATES, *ante*, p. 949. Motion for leave to file petition for rehearing denied. MR. JUSTICE MARSHALL took no part in the consideration or decision of this motion.

No. 79–545. HOLLOWAY *v.* TIMES MIRROR PRESS CO., *ante*, p. 966. Motion for leave to file petition for rehearing denied.

FEBRUARY 22, 1980

Dismissal Under Rule 60

No. 79–960. CHANDLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari dismissed under this Court's Rule 60. Reported below: 604 F. 2d 972.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 1104 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

LENHARD ET AL., CLARK COUNTY DEPUTY PUBLIC DEFENDERS, INDIVIDUALLY AND AS NEXT FRIENDS OF BISHOP *v.* WOLFF, WARDEN, NEVADA STATE PRISON SYSTEM, ET AL.

ON APPLICATION FOR STAY OF EXECUTION AND PETITION FOR REHEARING

Nos. A–172 and A–332. Decided October 18, 1979

Petition for rehearing of the Court's denial of an earlier application for a stay of execution of death sentence pending the filing of a petition for certiorari, see *ante*, p. 807, and an application for a stay of the rescheduled execution, are denied regardless of whether the submission is treated as a request for a rehearing of the previous denial of a stay of execution or as a new request for a stay of execution.

MR. JUSTICE REHNQUIST, Circuit Justice.

On October 1, 1979, this Court denied the application of Kirk Lenhard and George Franzen, acting as next friends of Jesse Bishop, for a stay of execution pending the filing and determination of a petition for certiorari. *Lenhard* v. *Wolff*, *ante*, p. 807. Respondents have subsequently rescheduled Bishop's execution for Monday, October 22, 1979. Lenhard and Franzen have now submitted to me, as Circuit Justice, a petition requesting rehearing of this Court's order of October 1, and an application for stay of execution pending determination of the petition for rehearing.

Resolving in applicants' favor all questions pertaining to procedures and rules of the Court, I am satisfied that the moving papers would not persuade the requisite number of Justices to grant applicants' proposed petition for certiorari, to

grant the petition for rehearing of this Court's previous denial of a stay pending the filing of a petition for certiorari, or to grant a stay pending Conference consideration of the petition for rehearing. See this Court's Rule 58. As a consequence, whether the submission presented to me as Circuit Justice on October 16, 1979, is treated as a request for a rehearing of our previous denial of a stay of execution, or as a new request for a stay of execution, it is in all respects

Denied.

PEEPLES *v.* BROWN, SECRETARY OF DEFENSE, ET AL.

ON APPLICATION FOR STAY AND INJUNCTION PENDING APPEAL

No. A–452. Decided November 29, 1979

Application for stay and injunction pending appeal from the Court of Appeals' order denying a stay pending appeal to that court from the District Court's judgment for respondents in applicant's action for injunctive relief against his discharge from the Navy for sexual misconduct, is denied. The application does not clearly indicate what grounds applicant would urge upon the Court of Appeals in seeking reversal of the District Court's judgment, what the transcript showed to support the administrative findings, or what the law prescribes as to the standards of administrative and judicial review of the proceedings leading to his discharge. Even if applicant's claim on the merits were more comprehensible and persuasive, he still failed to show the necessary irreparable injury required for a mandatory injunction.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant Peeples has presented me with what his attorney denominates as "Application for Stay and Injunction Pending Appeal," "pending appeal from an order of the United States Court of Appeals for the Ninth Circuit denying him a stay pending appeal to said court." Application 1. I have quoted verbatim from the application in order to permit some insight into my firm conviction that I have no idea as to what grounds applicant would urge upon the Court of Appeals for the Ninth Circuit in seeking reversal of the judgment of the United States District Court for the Northern District of California. The application is a hodgepodge of assertions as to the applicant's good character, his 19 years of service in the United States Navy, and his participation in an alcoholism therapy program.

Applicant complains at one point in the application, *id.*, at 3, that some of the evidence considered by the Administrative Discharge Board related to a prior enlistment and, under a precedent decided by the Court of Appeals for the

Ninth Circuit, should not have been considered; applicant also states that he made "disclosures to his doctors of isolated apparent incidents of off-duty off-base homosexual behavior while severely intoxicated," *ibid.*, although on the same page of the application he alleges that "[a]ll of the examining Navy doctors and alcohol counselors stated that he was *not homosexual*." *Ibid.* (emphasis in original).

According to the application, applicant's chief convened an Administrative Discharge Board, which heard the evidence obtained during therapy and, over his protest, found him guilty of acts of sexual misconduct and recommended his discharge. He then appealed his discharge to the Secretary of the Navy, who denied the appeal without "any basis in fact or written explanation, and ordered his immediate discharge within 5 working days, whereupon he sought injunctive relief from the United States District Court for the Northern District of California." *Id.*, at 4. Respondents agreed that applicant would be retained in the service at Treasure Island, Cal., pending the hearing of the preliminary injunction; meanwhile, according to applicant, his request for discovery under the Freedom of Information Act, 5 U. S. C. § 552, was objected to "and the District Court below refused to rule on Appellant's motion to compel." Application 5.

Thereafter, still according to the application, "[t]he District Court granted [respondents'] motion for summary judgment and declined to rule on [applicant's] motion for a preliminary injunction. A 10-day stay pending appeal to the Ninth Circuit was granted by the trial court. On November 23, 1979, the Ninth Circuit denied [applicant's] Emergency Motion for a stay and injunction pending appeal whereupon the instant motion was filed." *Ibid.*

Applicant urges that he will suffer irreparable injury because he has 19 years of time in the service, because he will be stigmatized by discharge for sexual misconduct, because he will lose flight time, and because "[s]uch a traumatic rejection by the government to whom he has given loyal service could

more than likely destroy the successful alcohol rehabilitation efforts to date." *Ibid.*

Applicant's moving papers, though consisting of nine typewritten pages, are remarkably skimpy in their reference to decisions of this Court. *O'Callahan* v. *Parker*, 395 U. S. 258 (1969); *Vitarelli* v. *Seaton*, 359 U. S. 535 (1959); *Harmon* v. *Brucker*, 355 U. S. 579 (1958); *Service* v. *Dulles*, 354 U. S. 363 (1957); and *SEC* v. *Chenery Corp.*, 332 U. S. 194 (1947), are the only cases cited, with no more than cryptic allusions to their relevance to this case.

Applicant makes no effort to indicate what the less than verbatim transcript before the Administrative Discharge Board indicated by way of support for the findings of that Board, or what the law prescribes as the standard of review for the Secretary of the Navy in reviewing the action of the Administrative Discharge Board. Applicant's moving papers even fail to identify either the standard of review of the United States District Court or that of the United States Court of Appeals for the Ninth Circuit in reviewing the action of the District Court unfavorable to applicant. In short, I am presented with what applicant's attorney undoubtedly feels is an appealing set of facts, but with virtually no law to accompany them. If either the District Court or the Court of Appeals gave any explanation for their conclusion in the form of an opinion or memorandum order, applicant has not seen fit to attach them to his application here. Even if applicant's claim on the merits were more comprehensible and persuasive, in my judgment he would still have failed to show the necessary irreparable injury required for a mandatory injunction. As this Court noted in *Sampson* v. *Murray*, 415 U. S. 61, 91 (1974), the legislative history of the Back Pay Act, 5 U. S. C. § 5596, "suggests that Congress contemplated that [that Act] would be the usual, if not the exclusive, remedy for wrongful discharge."

Since what applicant actually seeks is not a "stay" in any orthodox sense of that term, but an injunction from me, a

single Justice of the Supreme Court of the United States, forbidding the carrying out of the judgment of the Administrative Discharge Board, the Secretary of the Navy, the District Court, and the Court of Appeals for the Ninth Circuit, he labors under a heavy burden indeed. In my opinion, he has not met that burden, and his application is accordingly

Denied.

SYNANON FOUNDATION, INC., ET AL. *v.* CALIFORNIA ET AL.

ON APPLICATION FOR STAY

No. A-556. Decided December 28, 1979

Application for a stay of the District Court's order denying a preliminary injunction sought by a church (applicants) to preclude respondents from instituting an action against the applicants in state court, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

Upon consideration of the applicants' request for a stay of the order of the United States District Court for the Eastern District of California denying their prayer for a preliminary injunction precluding respondents, including George Deukmejian, the Attorney General of California, from instituting an action against the applicants in state court, the request is hereby denied.

The District Court's opinion denying the prayer for a preliminary injunction indicates that the Attorney General of California has the traditional power of the chief law enforcement officer of most jurisdictions to intervene in the administration of charitable trusts or corporations when he has reason to believe that they are not being administered in accordance with the trust instrument or with state law. We have stated previously that a trial judge's determination of a preliminary injunction should be reversed by this Court or by other appellate courts in the federal system only when the judge's "discretion was improvidently exercised." *Alabama* v. *United States*, 279 U. S. 229, 231 (1929). See also *Aberdeen & Rockfish R. Co.* v. *SCRAP*, 409 U. S. 1207 (1972) (BURGER, C. J., in chambers); *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 396 U. S. 1215 (1969) (BRENNAN, J., in chambers).

Applicants contend, however, that by reason of the fact that they are a church, under the First and Fourteenth Amend-

ments to the United States Constitution they are somehow entitled to different treatment than that accorded to other charitable trusts. But we held only last Term that state courts might resolve property disputes in which hierarchical church organizations were involved in accordance with "neutral principles" of state law. *Jones* v. *Wolf*, 443 U. S. 595, 602 (1979); see also *Presbyterian Church* v. *Hull Church*, 393 U. S. 440, 449 (1969). The District Court presumably found that this principle will probably be applicable in this litigation. The Court of Appeals for the Ninth Circuit also denied the application for a stay. I find no reason to differ with the conclusion of these two courts. Applicants' request for relief is accordingly denied.

CALIFORNIA *v.* BRAESEKE

ON APPLICATION FOR STAY

No. A-636. Decided January 31, 1980

Application for a stay of the California Supreme Court's judgment holding that the State had not carried its burden of showing that respondent had waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436, is granted pending referral of the matter to the next scheduled full Conference of this Court.

MR. JUSTICE REHNQUIST, Circuit Justice.

Applicant, the State of California, has asked me to stay a judgment of the Supreme Court of California in which that court held that the State had not carried its burden of showing that respondent had waived the rights to which he is entitled under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The respondent, on the other hand, contends that the Supreme Court of California, which divided by a vote of 4–3 on the question, decided the question on a state-law ground.

If respondent is correct, that is the end of the matter. My own reading of the majority and dissenting opinions in the case leaves me in doubt, since the three dissenters concluded that "[t]here can be no doubt this twenty-year-old defendant knowingly and intelligently waived his *Miranda* protections."

Within the past month we have summarily reversed a judgment of the Supreme Court of Louisiana, holding that it did not hold the State to a high enough standard of proof as to the waiver of a defendant's "*Miranda*" rights. *Tague* v. *Louisiana*, *ante*, p. 469. On the other hand, last Term we twice reversed State Supreme Courts for imposing additional or stricter requirements than we thought were required by the *Miranda* decision as a matter of federal constitutional law. *Fare* v. *Michael C.*, 442 U. S. 707 (1979); *North*

Carolina v. *Butler*, 441 U. S. 369 (1979). In the latter case we said:

> "The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As we unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Id.*, at 373.

Obviously this Court cannot review all decisions of other courts which hold that the prosecution has or has not carried its burden of showing that a defendant waived his "*Miranda*" rights. But my reading of the opinion of the Supreme Court of California in this case makes me think that if it was decided on the basis of federal constitutional law, it comes extraordinarily close to the adoption of a rule that in *no* cases can waiver be inferred from the actions and words of the person interrogated. I believe that four Members of the Court are sufficiently likely to share this view that I shall grant the stay requested by the State pending referral of the matter to the next scheduled full Conference of the Court, at which time the Court will have the opportunity of deciding whether to continue the stay, pending the filing of a petition for certiorari by the State, in order to remand the case to the Supreme Court of California so that it may say whether its judgment was based "on an adequate and independent nonfederal ground." *California* v. *Krivda*, 409 U. S. 33, 35 (1972).

The application for stay pending consideration by the full Court is accordingly granted.

PORTLEY *v.* GROSSMAN, WARDEN, ET AL.

ON APPLICATION FOR STAY

No. A–638 (79–5885). Decided February 1, 1980

Application by a federal prisoner—as to whom the Parole Commission, after revoking his parole, had applied current guidelines in establishing his next presumptive parole date, rather than the standards for reparole in effect when he was sentenced—for a stay of execution of the Court of Appeals' judgment denying a habeas corpus writ, pending review on certiorari in this Court, is denied.

MR. JUSTICE REHNQUIST, Circuit Justice.

The United States District Court for the Central District of California granted applicant's petition for a writ of habeas corpus and released him from federal custody pending appeal in the Ninth Circuit. The Ninth Circuit reversed, denying the writ, and declined to issue an order staying its mandate pending review on certiorari in this Court. Applicant then filed this request for a stay of execution of the Ninth Circuit's mandate, scheduled for issuance on February 11, 1980.

In April 1972, after pleading guilty to federal offenses, applicant was sentenced to serve six years in federal custody. Applicant was released on parole July 1, 1974. During his parole term, applicant was convicted of two separate offenses in state court. On June 20, 1978, the Parole Commission held a hearing and revoked applicant's parole on the basis of the two convictions. The Commission applied its guidelines currently in force, 28 CFR § 2.21 (1978), in establishing applicant's next presumptive parole date, indicating that a customary range of 34 to 44 months would be served before re-release.

Applicant filed a writ of habeas corpus in federal court, and the trial judge granted the writ, ordering the Parole Commission to reconsider and determine applicant's parole eligibility under the standards for reparole in effect when the applicant

was sentenced in April 1972. The Ninth Circuit reversed, relying on its decision in *Rifai* v. *United States Parole Comm'n*, 586 F. 2d 695 (1978), holding that the Parole Commission did not violate the constitutional prohibition against *ex post facto* laws by failing to rely on the guidelines in effect at the time of sentencing, rather than at the time of parole eligibility.

When applicant was sentenced in April 1972, the statutes then in force provided that if an individual was found to have violated parole, "the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced." 18 U. S. C. § 4207 (1970 ed.). Now, as in 1972, the Commission's determination to grant or deny parole is "committed to agency discretion." 18 U. S. C. § 4218 (d). The administrative guidelines articulating the factors relied on by the Commission in making parole and reparole decisions have changed from those in effect at the time of applicant's sentencing. But even assuming for purposes of this application that the *Ex Post Facto* Clause applies to parole in the manner it does to trial and sentence, the changes in issue are not impermissible, as applicant contends. In *Dobbert* v. *Florida*, 432 U. S. 282, 293 (1977), this Court held that the prohibition of *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Ibid.*

The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion. The terms of the sentence originally imposed have in no way been altered. Applicant cannot be held in confinement beyond the term imposed by the judge, and at the time of his sentence he knew that parole violations would put him at risk of serving the balance of his sentence in federal custody. The guidelines, therefore, neither deprive applicant of any pre-existing right

nor enhance the punishment imposed. The change in guidelines assisting the Commission in the exercise of its discretion is in the nature of a procedural change found permissible in *Dobbert, supra.*

Since I do not believe that applicant is being held in custody in violation of the Constitution, I deny the application for a stay.

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Ohio-Kentucky boundary.—Boundary between Ohio and Kentucky is low-water mark on northerly side of Ohio River as it existed in 1792 when Kentucky was admitted to Union, not current low-water mark on northerly side of river. Ohio v. Kentucky, p. 335.

BREACH OF CONTRACT. See **Government Officers and Employees; Labor Management Relations Act; Tucker Act.**

BREACH OF FIDUCIARY DUTY. See **Government Officers and Employees; Investment Advisers Act of 1940.**

BRIBERY. See **Travel Act.**

BROKERS. See **Antitrust Acts.**

BURDEN OF PROOF. See **Constitutional Law,** VII; **Criminal Law; Stays,** 1.

CALIFORNIA. See **Constitutional Law,** III, 1; **Stays,** 1, 5.

CANAL SYSTEMS. See **Constitutional Law,** II, 2.

CAPITAL PUNISHMENT. See **Stays,** 2.

CARRIERS. See **Judicial Review,** 1.

CENTRAL INTELLIGENCE AGENCY. See **Government Officers and Employees; Mandamus and Venue Act of 1962.**

CHARITABLE ORGANIZATIONS. See **Constitutional Law,** V, 1.

CHURCHES. See **Constitutional Law,** IV; **Stays,** 5.

CHURCH-RELATED SCHOOLS. See **Constitutional Law,** IV.

CIRCULATING PETITIONS ON MILITARY BASES. See **Armed Forces; Constitutional Law,** V, 2.

CITIZENSHIP. See **Constitutional Law, I.**

CIVIL RIGHTS ACT OF 1964.

Racial discrimination—Employers' seniority system.—In action alleging that employers' seniority system discriminated against Negroes in violation of Title VII of Act, Court of Appeals erred in holding that requirement of collective-bargaining agreement that a temporary employee must work at least 45 weeks in a single calendar year before he can become a permanent employee, entitled to greater seniority benefits than temporary employees, is not a component of a "seniority system" within meaning of provisions of § 703 (h) of Title VII excepting bona fide seniority systems from Act's proscriptions. California Brewers Assn. v. Bryant, p. 598.

CLAIMS AGAINST UNITED STATES. See **Federal Tort Claims Act.**

CLASS ACTIONS. See **Attorney's Fees.**

CLASSIFIED INFORMATION. See **Government Officers and Employees.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Civil Rights Act of 1964; Labor Management Relations Act.**

COLUMBIA RIVER. See **Parties.**

COMMERCE CLAUSE. See **Constitutional Law, II.**

COMMERCE DEPARTMENT. See **Appeals; Merchant Marine Act.**

COMMERCIAL BRIBERY. See **Travel Act.**

COMMERCIAL SPEECH. See **Constitutional Law, V, 1.**

COMMERCIAL TRANSACTIONS IN PARTS OF BIRDS. See **Constitutional Law, VIII.**

COMMON-FUND DOCTRINE. See **Attorney's Fees.**

COMMON-LAW BRIBERY. See **Travel Act.**

COMMUNICATIONS WITH MEMBERS OF CONGRESS. See **Armed Forces.**

COMPELLED EXECUTION OF HANDWRITING EXEMPLARS. See **Internal Revenue Code.**

CONDEMNATION. See **Constitutional Law, II, 1.**

CONDITIONS OF CONFINEMENT. See **Criminal Law.**

CONSPIRACY TO FIX REAL ESTATE BROKERS' FEES. See **Antitrust Acts.**

CONSTITUTIONAL LAW. See also **Habeas Corpus; Internal Revenue Code.**

I. Citizenship.

Proof in expatriation proceedings.—While Government, in expatriation proceedings, must prove an intent to surrender United States citizenship, not just voluntary commission of expatriating act such as swearing allegiance to a foreign nation, nevertheless preponderance-of-evidence standard for proving loss of citizenship, provided in § 349 (c) of Immigration and Nationality Act, is not invalid under either Citizenship Clause of Fourteenth Amendment or Due Process Clause of Fifth Amendment; nor is provision in § 349 (c) that voluntariness of expatriating conduct is rebuttably presumed constitutionally infirm. Vance v. Terrazas, p. 252.

II. Commerce Clause.

1. *Public access to private waterways—Eminent domain.*—Notwithstanding Congress' authority under Commerce Clause to regulate navigable waterways, Government may not, without invoking its eminent domain power and paying just compensation, require petitioners to allow public free access to navigable pond on petitioners' property after petitioners, by dredging operations, had converted pond into marina and connected it to contiguous navigable bay. Kaiser Aetna v. United States, p. 164.

2. *Public access to private waterways—Natural waterways.*—While public has no general right of use of navigable channels built on private property with private funds in such a manner that they ultimately join with other navigable waterways, nevertheless if it is proved that respondent's canal system destroyed navigability of surrounding natural waterways, it cannot be said as matter of law that such proof would not constitute a defense under federal law to respondent's prayer for injunction against petitioners' use of respondent's canals. Vaughn v. Vermilion Corp., p. 206.

III. Due Process.

1. *Murder committed by parolee—Parole officials' liability.*—A California statute granting public employees absolute immunity from liability for injuries resulting from parole-release decisions is not unconstitutional under Due Process Clause when applied to defeat a tort claim arising under state law, and appellants, seeking to recover from state officials for murder of appellants' decedent, a 15-year-old girl who was murdered by parolee five months after his release from prison despite history as a sex offender, had no claim for relief under federal law. Martinez v. California, p. 277.

2. *Products-liability action—In personam jurisdiction.*—Consistently with Due Process Clause, an Oklahoma trial court may not exercise *in personam*

CONSTITUTIONAL LAW—Continued.

jurisdiction over an automobile retailer and its wholesaler, New York corporations that did no business in Oklahoma, in a products-liability action brought against them by nonresident plaintiffs who had sustained personal injuries in an accident involving an automobile that had been purchased by them in New York while they were New York residents and that was being driven through Oklahoma when accident occurred. World-Wide Volkswagen Corp. v. Woodson, p. 286.

3. *Quasi in rem jurisdiction—Attachment of insurer's obligation to defend suit*—Consistently with Due Process Clause, a State may not constitutionally exercise *quasi in rem* jurisdiction over a defendant who has no forum contacts—such as driver of an automobile involved in an out-of-state accident resulting in injuries to plaintiff who later became a resident of forum State—by attaching contractual obligation of an insurer licensed to do business in State to defend and indemnify defendant in connection with suit. Rush v. Savchuk, p. 320.

IV. Freedom of Religion.

Aid to nonpublic schools—Validity of New York statute.—A New York statute providing for reimbursement to nonpublic schools from state funds for schools' costs incurred in complying with certain state-mandated requirements, including requirements as to testing and as to reporting and recordkeeping, does not violate First and Fourteenth Amendments. Committee for Public Education v. Regan, p. 646.

V. Freedom of Speech.

1. *Charitable contributions—Door-to-door or on-street solicitation—Validity of ordinance.*—Ordinance prohibiting door-to-door or on-street solicitation of contributions by charitable organizations that do not use at least 75% of their receipts for "charitable purposes," excluding solicitation expenses, salaries, overhead, and other administrative expenses, is unconstitutionally overbroad in violation of First and Fourteenth Amendments. Schaumburg v. Citizens for Better Environment, p. 620.

2. *Validity of Air Force regulations—Circulating petitions on bases.*—Air Force regulations requiring members of that service to obtain approval from their commanders before circulating petitions on Air Force bases are not facially invalid as violating First Amendment. Brown v. Glines, p. 348.

VI. Searches and Seizures.

Patdown search of tavern customers.—Fourth and Fourteenth Amendments were violated when police, executing warrant based on probable cause to search tavern and bartender for drugs, conducted patdown weapons search of customers and seized heroin from one of customers, where police had no probable cause to believe that customers would be violating law. Ybarra v. Illinois, p. 85.

CONSTITUTIONAL LAW—Continued.

VII. Self-Incrimination.

Miranda rights—Waiver.—Petitioner's inculpatory statement to arresting officer was erroneously admitted in evidence at his state-court trial at which he was convicted, where no evidence was introduced to prove that petitioner knowingly and intelligently waived his *Miranda* rights before making statement. Tague v. Louisiana, p. 469.

VIII. Taking of Property.

Eagle Protection Act—Migratory Bird Treaty Act.—Both Eagle Protection Act and Migratory Bird Treaty Act contemplate regulatory prohibition of commerce in parts of protected birds without regard to when birds were originally taken, and application of regulations to prohibit sale of "pre-existing" Indian artifacts partly composed of feathers from currently protected birds legally obtained prior to Acts' effective dates does not amount to a taking of property in violation of Fifth Amendment, even though regulations prevent most profitable use of property. Andrus v. Allard, p. 51.

CONSTRUCTION-DIFFERENTIAL SUBSIDIES FOR VESSELS. See **Appeals; Merchant Marine Act.**

CONSTRUCTIVE TRUSTS. See **Government Officers and Employees.**

CONTINUING OFFENSES. See **Criminal Law.**

CONTRACT CARRIER PERMITS. See **Judicial Review, 1.**

CONTRACTS. See **Government Officers and Employees; Truth in Lending Act; Tucker Act.**

CONTRIBUTIONS TO CHARITABLE ORGANIZATIONS. See **Constitutional Law, V, 1.**

CONVERTIBLE DEBENTURES. See **Attorney's Fees.**

COTTON HEADERS. See **Longshoremen's and Harbor Workers' Compensation Act.**

COURT-APPOINTED COUNSEL'S MALPRACTICE LIABILITY. See **Criminal Justice Act of 1964.**

COURT OF CLAIMS. See **Tucker Act.**

COURTS OF APPEALS. See **Appeals; Judicial Review; Procedure, 2.**

CREDITORS. See **Truth in Lending Act.**

CRIMINAL JUSTICE ACT OF 1964.

Court-appointed defense counsel—Malpractice liability.—An attorney appointed under Act by a federal judge to represent an indigent defendant in a federal criminal trial is not, as a matter of federal law, entitled

CRIMINAL JUSTICE ACT OF 1964—Continued.

to absolute immunity in a state malpractice suit brought against him by his former client. Ferri v. Ackerman, p. 193.

CRIMINAL LAW. See also **Constitutional Law**, VI; VII; **Criminal Justice Act of 1964**; **Habeas Corpus**; **Procedure**, 2; **Stays**, 1, 2; **Travel Act.**

Prosecution for escape—Defense—Duress or necessity.—In a prosecution under 18 U. S. C. § 751 (a), which governs escape from federal custody, Government fulfills its burden by demonstrating that escapee knew his actions would result in his leaving physical confinement without permission, and escapee is not entitled to an instruction on duress or necessity as a defense unless he offers evidence justifying his continued absence from custody as well as his initial departure, an indispensable element of such offer being testimony of a bona fide effort to surrender as soon as claimed duress or necessity had lost its coercive force. United States v. Bailey, p. 394.

CUSTODIAL POLICE INTERROGATION. See **Constitutional Law**, VII; **Stays**, 1.

CUSTOMS SERVICE. See **Tucker Act.**

DAMAGES. See also **Government Officers and Employees**; **Investment Advisers Act of 1940**; **Mandamus and Venue Act of 1962.**

FELA action—Wrongful death—Income taxes.—In a wrongful-death action under Federal Employers' Liability Act, state trial court erred in excluding evidence offered by defendant to show effect of income taxes on decedent's estimated future earnings, and in refusing defendant's requested jury instruction that "your award will not be subject to any income taxes, and you should not consider such taxes in fixing the amount of your award." Norfolk & Western R. Co. v. Liepelt, p. 490.

DEATH ACTIONS. See **Damages.**

DEATH SENTENCES. See **Stays**, 2.

DEBENTURES. See **Attorney's Fees.**

DEBTOR AND CREDITOR. See **Truth in Lending Act.**

DE FACTO SEGREGATION. See **Emergency School Aid Act.**

DE JURE SEGREGATION. See **Emergency School Aid Act.**

DEPARTMENT OF COMMERCE. See **Appeals**; **Merchant Marine Act.**

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. See **Emergency School Aid Act.**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT. See **Judicial Review**, 2.

DEPARTMENT OF JUSTICE. See **Procedure**, 2.

DERIVATIVE SUITS. See **Investment Advisers Act of 1940.**

DISCHARGE FROM ARMED FORCES. See **Stays**, 3.

DISCLOSURE OF CREDIT TERMS. See **Truth in Lending Act.**

DISCRIMINATION IN EMPLOYMENT. See **Civil Rights Act of 1964; Emergency School Aid Act.**

DISCRIMINATION IN TEACHER HIRING, PROMOTION, AND ASSIGNMENT. See **Emergency School Aid Act.**

DISMISSAL OF ACTIONS. See **Procedure**, 1.

DISPARATE-IMPACT TEST OF DISCRIMINATION. See **Emergency School Aid Act.**

DISTRICT COURTS. See **Appeals; Attorney's Fees; Procedure**, 1.

DOCKSIDE EMPLOYEES. See **Longshoremen's and Harbor Workers' Compensation Act.**

DOOR-TO-DOOR SOLICITING. See **Constitutional Law**, V, 1.

DRUG OFFENSES. See **Constitutional Law**, VI.

DUE PROCESS. See **Constitutional Law**, I; III; **Habeas Corpus.**

DURESS. See **Criminal Law.**

EAGLE PROTECTION ACT. See **Constitutional Law**, VIII.

ELIGIBILITY FOR PAROLE. See **Stays**, 4.

EMERGENCY SCHOOL AID ACT.

Racial discrimination—Disparate-impact test—Statistical evidence.—Discriminatory impact, rather than intentional racial discrimination, is standard by which ineligibility of educational agency for federal financial assistance under Act is to be measured, irrespective of whether discrimination relates to demotion or dismissal of instructional or other personnel or to hiring, promotion or assignment of employees, and a prima facie case of discriminatory impact may be made by a proper statistical study. Board of Education, New York City v. Harris, p. 130.

EMINENT DOMAIN. See **Constitutional Law**, II, 1.

EMPLOYER AND EMPLOYEES. See **Civil Rights Act of 1964; Government Officers and Employees; Labor Management Relations Act; Longshoremen's and Harbor Workers' Compensation Act; National Labor Relations Act.**

ENVIRONMENTAL PROTECTION. See **Constitutional Law**, V, 1; **Judicial Review**, 2.

ESCAPE FROM CONFINEMENT. See **Criminal Law.**

ESTABLISHMENT CLAUSE. See **Constitutional Law,** IV.

EVIDENCE. See **Constitutional Law,** I; II, 2; **Criminal Law; Damages; Emergency School Aid Act; Habeas Corpus; Internal Revenue Code.**

EXECUTIONS. See **Stays,** 2.

EXPATRIATION. See **Constitutional Law,** I.

FACULTY MEMBERS. See **National Labor Relations Act.**

FEDERAL BUREAU OF INVESTIGATION. See **Mandamus and Venue Act of 1962.**

FEDERAL EMPLOYERS' LIABILITY ACT. See **Damages.**

FEDERAL FINANCIAL ASSISTANCE. See **Emergency School Aid Act.**

FEDERAL NAVIGATIONAL SERVITUDE. See **Constitutional Law,** II.

FEDERAL OFFICERS AND EMPLOYEES. See **Government Officers and Employees; Mandamus and Venue Act of 1962.**

FEDERAL RESERVE BOARD. See **Truth in Lending Act.**

FEDERAL RULES OF CIVIL PROCEDURE. See **Appeals.**

FEDERAL-STATE RELATIONS. See **Criminal Justice Act of 1964; Habeas Corpus; Parties; Stays,** 5.

FEDERAL TORT CLAIMS ACT. See also **Tucker Act.**

Limitation of actions—Medical malpractice—Accrual of claim.—A claim against Government for medical malpractice accrues within meaning of 2-year limitation provision of Act when plaintiff knows both existence and cause of his injury, and not at a later time when he also knows that acts inflicting injury may constitute malpractice. United States v. Kubrick, p. 111.

FEES OF REAL ESTATE BROKERS. See **Antitrust Acts.**

FIDUCIARY DUTY. See **Government Officers and Employees; Investment Advisers Act of 1940.**

FIFTH AMENDMENT. See **Constitutional Law,** I; II; VIII; **Internal Revenue Code.**

FINAL DECISIONS. See **Appeals.**

FINANCE COMPANIES. See **Truth in Lending Act.**

FINANCIAL AID TO SCHOOLS. See **Emergency School Aid Act.**

FINANCING REAL ESTATE TRANSACTIONS. See **Antitrust Acts.**

FIRST AMENDMENT. See **Constitutional Law**, IV; V.

FISHING RIGHTS. See **Parties.**

FOURTEENTH AMENDMENT. See **Constitutional Law**, I; III; IV; V, 1; VI; **Habeas Corpus.**

FOURTH AMENDMENT. See **Constitutional Law**, VI; **Internal Revenue Code.**

FRAUDULENT CONDUCT OF INVESTMENT ADVISERS. See **Investment Advisers Act of 1940.**

FREEDOM OF RELIGION. See **Constitutional Law**, IV.

FREEDOM OF SPEECH. See **Constitutional Law**, V.

FUTURE EARNINGS. See **Damages.**

GARNISHMENT. See **Constitutional Law**, III, 3.

GOLDEN EAGLES. See **Constitutional Law**, VIII.

GOVERNMENT OFFICERS AND EMPLOYEES. See also **Mandamus and Venue Act of 1962.**

CIA employee—Employment agreement—Breach of fiduciary duty.—A former Central Intelligence Agency employee breached a fiduciary obligation when he published a book about certain Agency activities without submitting manuscript for Agency's prepublication review as required by employment agreement, and proceeds of his breach are impressed with a constructive trust for Government's benefit. Snepp v. United States, p. 507.

HABEAS CORPUS. See also **Stays**, 4.

State-court conviction—Sufficiency of evidence.—Under due process requirement that conviction be based on proof of guilt beyond a reasonable doubt, federal habeas corpus court, assessing sufficiency of evidence to support a state-court conviction, must inquire whether, viewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond reasonable doubt. Pilon v. Bordenkircher, p. 1.

HANDWRITING EXEMPLARS. See **Internal Revenue Code.**

HEALTH, EDUCATION, AND WELFARE DEPARTMENT. See **Emergency School Aid Act.**

HEROIN. See **Constitutional Law**, VI.

HOMOSEXUALS. See **Stays**, 3.

HOUSING AND URBAN DEVELOPMENT DEPARTMENT. See **Judicial Review**, 2.

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HOUSING PROJECTS. See **Judicial Review**, 2.

IDAHO. See **Parties.**

ILLINOIS. See **Constitutional Law**, IV; **Damages.**

IMMIGRATION AND NATIONALITY ACT. See **Constitutional Law**, I.

IMMUNITY OF APPOINTED COUNSEL FROM MALPRACTICE LIABILITY. See **Criminal Justice Act of 1964.**

IMMUNITY OF STATE OFFICIALS FROM LIABILITY. See **Constitutional Law**, III, 1.

IMMUNITY OF UNITED STATES FROM LIABILITY. See **Federal Tort Claims Act; Tucker Act.**

IMPLIED BAILMENT CONTRACTS. See **Tucker Act.**

IMPLIED PRIVATE CAUSES OF ACTION. See **Investment Advisers Act of 1940.**

INADEQUATE NOTICE OF DEBENTURE REDEMPTION. See **Attorney's Fees.**

INCOME TAXES. See **Damages; Internal Revenue Code.**

INCULPATORY STATEMENTS. See **Constitutional Law**, VII.

INDIAN ARTIFACTS. See **Constitutional Law**, VIII.

INDIANS. See **Parties.**

INDICTMENTS. See **Criminal Law.**

INDIGENTS. See **Criminal Justice Act of 1964.**

INJUNCTIONS. See **Constitutional Law**, II, 2; **Investment Advisers Act of 1940; Stays**, 3, 5.

IN PERSONAM JURISDICTION. See **Constitutional Law**, II, 2, 3.

INSTALLMENT CONTRACTS. See **Truth in Lending Act.**

INSTRUCTIONS TO JURY. See **Criminal Law; Damages.**

INSURER'S OBLIGATION TO DEFEND SUIT AGAINST INSURED. See **Constitutional Law**, III, 3.

INTEGRITY CLAUSE OF COLLECTIVE-BARGAINING AGREEMENT. See **Labor Management Relations Act.**

INTERNAL REVENUE CODE.

Tax investigation—Summons authority—Compelling execution of handwriting exemplars.—Internal Revenue Service, in conducting a tax investigation, is empowered to compel execution of handwriting exemplars under its summons authority conferred by § 7602 of Code, compulsion of

INTERNAL REVENUE CODE—Continued.

such exemplars being neither a search or seizure subject to Fourth Amendment protections nor testimonial evidence protected by Fifth Amendment privilege against self-incrimination. United States v. Euge, p. 707.

INTERNAL REVENUE SERVICE. See **Internal Revenue Code.**

INTERNATIONAL UNION'S LIABILITY FOR STRIKES BY LOCAL UNIONS. See **Labor Management Relations Act.**

INTERROGATIONS BY POLICE. See **Constitutional Law**, VII; **Stays**, 1.

INTERSTATE COMMERCE. See **Antitrust Acts**; **Judicial Review**, 1.

INTERSTATE COMMERCE ACT. See **Judicial Review**, 1.

INTERSTATE COMMERCE COMMISSION. See **Judicial Review**, 1.

INVESTMENT ADVISERS ACT OF 1940.

Violations of Act—Private remedies.—Under provisions of § 215 of Act that contract whose formation or performance would violate Act shall be void as regards rights of violator, a limited private remedy to void an investment advisers contract exists by way of a suit for rescission or for an injunction against continued operation of contract, and for restitution, but a private cause of action for damages is not created by § 206 of Act, which simply proscribes certain fraudulent conduct by investment advisers in dealing with clients. Transamerica Mortgage Advisers, Inc. v. Lewis, p. 11.

JAILS. See **Criminal Law.**

JUDGMENTS. See **Appeals**; **Attorney's Fees.**

JUDICIAL IMMUNITY. See **Criminal Justice Act of 1964.**

JUDICIAL REVIEW.

1. *ICC orders.*—Court of Appeals erred in vacating Interstate Commerce Commission's order granting contract carrier permit, even though order was defective for lack of finding required by Interstate Commerce Act, and in refusing to consider instead Commission's subsequent orders that remedied defect and that had been entered while appeal from first order was still pending. United States v. Benmar Transp. & Leasing Corp., p. 4.

2. *Low-income housing project—HUD determination of site.*—Court of Appeals erred in concluding that when Department of Housing and Urban Development considered alternative sites before redesignating a proposed site for middle-income housing as one for low-income housing it should have given determinative weight to environmental factors and should not have considered delay that would occur in developing an alternative site as an overriding factor. Strycker's Bay Neighborhood Council v. Karlen, p. 223.

JURISDICTION. See **Antitrust Acts; Appeals; Constitutional Law,** III, 2, 3; **Mandamus and Venue Act of 1962.**

JURY INSTRUCTIONS. See **Criminal Law; Damages.**

JUST COMPENSATION. See **Constitutional Law,** II, 1.

JUSTICE DEPARTMENT. See **Procedure,** 2.

KENTUCKY. See **Boundaries; Habeas Corpus.**

LABOR MANAGEMENT RELATIONS ACT.

Unauthorized strikes by local unions—Liability of international and regional unions.—An international union and its regional subdivision cannot be held liable in damages to an employer under § 301 of Act for unauthorized strikes by local unions, since no obligation on international or regional unions' part to use all reasonable means to prevent and end unauthorized strikes can be implied in law either because collective-bargaining agreements between international union and employer contained a provision for arbitration of disputes or because agreements provided that parties agreed to "maintain the integrity of this contract." Carbon Fuel Co. v. Mine Workers, p. 212.

LABOR UNIONS. See **Labor Management Relations Act; National Labor Relations Act.**

LAND-BASED EMPLOYEES AS ENGAGED IN MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

LEGISLATIVE REAPPORTIONMENT. See **Procedure,** 1.

LIMITATION OF ACTIONS. See **Federal Tort Claims Act.**

LOCAL ACTIVITY AS AFFECTING INTERSTATE COMMERCE. See **Antitrust Acts.**

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT.

"Maritime employment"—Covered persons.—A worker who was injured on a dock while fastening onto railroad flatcars vehicles that had been delivered to port by ship, stored, and then loaded day before accident onto flatcars, and another worker who was injured while unloading cotton from a dray wagon into a pier warehouse to await loading onto ships after cotton had arrived at port from inland shippers and had been initially stored in other warehouses, were both engaged in "maritime employment" at time of their injuries, for purpose of coverage under Act. P. C. Pfeiffer Co. v. Ford, p. 69.

LOSS OF CITIZENSHIP. See **Constitutional Law,** I.

LOUISIANA. See **Constitutional Law, VII; Travel Act.**

LOW-INCOME HOUSING. See **Judicial Review, 2.**

MALPRACTICE OF APPOINTED COUNSEL. See **Criminal Justice Act of 1964.**

MALPRACTICE OF PHYSICIANS. See **Federal Tort Claims Act.**

MANAGERIAL EMPLOYEES. See **National Labor Relations Act.**

MANDAMUS AND VENUE ACT OF 1962.

Action against federal officials—Money damages.—Section 2 of Act—which provides that a civil action in which a defendant is a federal officer or employee acting in his official capacity or under color of legal authority may be brought in certain judicial districts and that delivery of summons and complaint may be made by certified mail beyond territorial limits of district in which suit is brought—does not apply to actions for money damages brought against federal officials in their individual capacities. Stafford v. Briggs, p. 572.

MARINE CORPS. See **Armed Forces, 2.**

MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

MEDICAL MALPRACTICE. See **Federal Tort Claims Act.**

MEMBERS OF CLASS. See **Attorney's Fees.**

MERCHANT MARINE ACT. See also **Appeals.**

Construction-differential subsidy for vessel—Release from restrictions.—Act empowers Secretary of Commerce to approve permanent release of shipbuilder and owner, receiving a federal construction-differential subsidy to build vessel, from restrictions of § 506 of Act whereby recipient of subsidy must agree to use vessel exclusively in foreign trade. Seatrain Shipbuilding Corp. v. Shell Oil Co., p. 572.

MEXICO. See **Constitutional Law, I.**

MIDDLE-INCOME HOUSING. See **Judicial Review, 2.**

MIGRATORY BIRD TREATY ACT. See **Constitutional Law, VIII.**

MILITARY BASES. See **Armed Forces; Constitutional Law, V, 2.**

MILITARY PERSONNEL. See **Armed Forces; Constitutional Law, V, 2; Stays, 3.**

MINIMUM-CONTACTS STANDARD. See **Constitutional Law, III, 2, 3.**

MINNESOTA. See **Constitutional Law, III, 3.**

MIRANDA WARNINGS. See **Constitutional Law, VII; Stays, 1.**

MOOTNESS. See **Procedure**, 1.

NARCOTICS OFFENSES. See **Constitutional Law**, VI.

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969. See **Judicial Review**, 2.

NATIONALITY. See **Constitutional Law**, I.

NATIONAL LABOR RELATIONS ACT.

Private university—Faculty members as "managerial" employees.—A private university's full-time faculty members, who exercise extensive control over academic and personnel decisions and other central policies of university, are "managerial" employees excluded from Act's coverage. NLRB v. Yeshiva University, p. 672.

NATIONAL SECURITY. See **Government Officers and Employees.**

NAVIGABLE WATERS. See **Constitutional Law**, II.

NAVY. See **Armed Forces**, 2; **Stays**, 3.

NEGROES. See **Civil Rights Act of 1964.**

NEVADA. See **Stays**, 2.

NEW YORK. See **Constitutional Law**, IV.

"NO EVIDENCE" TEST. See **Habeas Corpus.**

NOMINAL DAMAGES. See **Government Officers and Employees.**

NONPUBLIC SCHOOLS. See **Constitutional Law**, IV.

NONTESTIMONIAL EVIDENCE. See **Internal Revenue Code.**

NOTICE OF REDEMPTION OF DEBENTURES. See **Attorney's Fees.**

OATHS OF ALLEGIANCE TO FOREIGN NATIONS. See **Constitutional Law**, I.

"OCCUPATIONAL" TEST FOR MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

OHIO. See **Boundaries.**

OHIO RIVER. See **Boundaries.**

OKLAHOMA. See **Constitutional Law**, III, 2.

ON-STREET SOLICITING. See **Constitutional Law**, V, 1.

ORDINANCES. See **Constitutional Law**, V, 1.

OREGON. See **Parties.**

"ORGANIZED CRIME" LEGISLATION. See **Travel Act.**

ORIGINAL PROCEEDINGS. See **Parties.**

OVERBREADTH. See **Constitutional Law**, V, 1.

OVERSEAS MILITARY BASES. See **Armed Forces**, 2.

PAROCHIAL SCHOOLS. See **Constitutional Law**, IV.

PAROLE. See **Constitutional Law**, III, 1; **Stays**, 4.

PARTIES.

Action between States—Fishing rights—United States as necessary party.—Failure to join United States as a party to Idaho's action against Oregon and Washington to secure equitable apportionment of various runs of anadromous fish migrating between spawning grounds in Idaho and Pacific Ocean, does not prevent this Court from entering an adequate judgment. Idaho ex rel. Evans v. Oregon, p. 380.

PATDOWN SEARCHES. See **Constitutional Law**, VI.

PENNSYLVANIA. See **Criminal Justice Act of 1964.**

PERMANENT EMPLOYEES. See **Civil Rights Act of 1964.**

PERSONAL JURISDICTION. See **Constitutional Law**, III, 2, 3.

"PETITE" POLICY. See **Procedure**, 2.

PETITIONING MEMBERS OF CONGRESS. See **Armed Forces.**

PHYSICAL EVIDENCE. See **Internal Revenue Code.**

PHYSICIANS. See **Federal Tort Claims Act.**

"POINT OF REST" DOCTRINE. See **Longshoremen's and Harbor Workers' Compensation Act.**

POLICE INTERROGATIONS. See **Constitutional Law**, VII; **Stays**, 1.

PONDS. See **Constitutional Law**, II, 1.

POSSESSION OF DRUGS. See **Constitutional Law**, VI.

PRELIMINARY INJUNCTIONS. See **Stays**, 5.

PREPONDERANCE OF EVIDENCE. See **Constitutional Law**, I.

PREPUBLICATION CLEARANCE OF GOVERNMENT EMPLOYEES' WRITINGS. See **Government Officers and Employees.**

PRESUMPTIONS. See **Constitutional Law**, I.

PREVENTION OF STRIKES. See **Labor Management Relations Act.**

PRIMA FACIE CASE OF RACIAL DISCRIMINATION. See **Emergency School Aid Act.**

PRISONERS. See **Criminal Law.**

PRIVATE RIGHTS OF ACTION. See **Investment Advisers Act of 1940.**

PRIVATE UNIVERSITIES. See **National Labor Relations Act.**

PRIVATE WATERWAYS. See **Constitutional Law, II.**

PROBABLE CAUSE FOR SEARCH. See **Constitutional Law, VI.**

PROCEDURE.

1. *Appeal—Mootness of issue.*—Where Tennessee Legislature enacted a new senatorial districting plan after District Court had invalidated earlier plan and while appeal to Supreme Court was pending, only issue raised on appeal, not entire case, was moot, and thus District Court's judgment will be vacated without prejudice to further appropriate proceedings in that court. Crowell v. Mader, p. 505.

2. *Federal conviction—Prosecution in violation of Justice Department's policy—Remand by Supreme Court.*—Where Court of Appeals, in affirming petitioner's conviction, accepted Government's position that there had been no violation of Justice Department's policy whereby United States attorneys, unless specifically authorized by Department, may not prosecute if person's alleged criminal behavior was an ingredient of a previous state prosecution against such person, but in this Court Solicitor General conceded that United States Attorney had not obtained proper authorization for prosecution, this Court will vacate Court of Appeals' judgment and remand case for that court's reconsideration in light of Government's present position. Thompson v. United States, p. 248.

PRODUCTS LIABILITY. See **Constitutional Law, III, 2.**

PROFESSIONAL EMPLOYEES. See **National Labor Relations Act.**

PROHIBITION OF SALE OF PROPERTY. See **Constitutional Law, VIII.**

PROOF BEYOND REASONABLE DOUBT. See **Habeas Corpus.**

PROPERTY RIGHTS. See **Constitutional Law, II; VIII.**

PUBLIC ACCESS TO PRIVATE WATERWAYS. See **Constitutional Law, II.**

PUBLIC OFFICERS AND EMPLOYEES. See **Constitutional Law, III, 1; Government Officers and Employees; Mandamus and Venue Act of 1962; Travel Act.**

PUNITIVE DAMAGES. See **Government Officers and Employees.**

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RACIAL DISCRIMINATION. See **Civil Rights Act of 1964; Emergency School Aid Act.**

REAL ESTATE BROKERS. See **Antitrust Acts.**

REASONABLE-DOUBT STANDARD. See **Habeas Corpus.**

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REIMBURSEMENT FOR EDUCATIONAL SERVICES. See **Constitutional Law**, IV.

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RESCISSION. See **Investment Advisers Act of 1940.**

RESTITUTION. See **Investment Advisers Act of 1940.**

RETAIL INSTALLMENT CONTRACTS. See **Truth in Lending Act.**

REVOCATION OF PAROLE. See **Stays**, 4.

RIGHT OF ACCESS TO PRIVATE WATERWAYS. See **Constitutional Law**, II.

RIGHT TO COUNSEL. See **Constitutional Law**, VII.

RIPARIAN RIGHTS. See **Constitutional Law**, II.

RIVERS AND HARBORS APPROPRIATION ACT OF 1899. See **Constitutional Law**, II, 1.

SALMON FISHING. See **Parties.**

SCHAUMBURG, ILL. See **Constitutional Law**, V, 1.

SCHOOLS. See **Constitutional Law**, IV; **Emergency School Aid Act.**

SEARCHES AND SEIZURES. See **Constitutional Law**, VI; **Internal Revenue Code.**

SEARCH WARRANTS. See **Constitutional Law**, VI.

SECRETARY OF COMMERCE. See **Appeals; Merchant Marine Act.**

SECRETARY OF THE INTERIOR. See **Constitutional Law**, VIII.

SECRETARY OF THE NAVY. See **Stays**, 3.

SECTARIAN SCHOOLS. See **Constitutional Law**, IV.

SELF-INCRIMINATION. See **Constitutional Law**, VII; **Internal Revenue Code.**

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SNAKE RIVER. See **Parties.**

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"STATUS" TEST FOR MARITIME EMPLOYMENT. See **Longshoremen's and Harbor Workers' Compensation Act.**

STATUTES OF LIMITATION. See **Federal Tort Claims Act.**

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1. *Burden of proof—Waiver of Miranda rights.*—Application to stay California Supreme Court's judgment holding that State had not carried its burden of showing that respondent had waived his *Miranda* rights, is granted. California v. Braeseke (REHNQUIST, J., in chambers), p. 1309.

STAYS—Continued.

2. *Death sentence.*—Petition for rehearing of Court's denial of earlier application for stay of execution of death sentence, and application for stay of rescheduled execution, are denied. Lenhard v. Wolff (REHNQUIST, J., in chambers), p. 1301.

3. *Discharge from Navy—Injunctive relief.*—Application for stay and injunction pending appeal from Court of Appeals' order denying stay pending appeal to that court from District Court's judgment denying injunctive relief against applicant's discharge from Navy for sexual misconduct, is denied. Peeples v. Brown (REHNQUIST, J., in chambers), p. 1303.

4. *Habeas corpus—Parole eligibility.*—Application by a federal prisoner—as to whom Parole Commission, after revoking his parole, had applied current guidelines to establish next presumptive parole date, rather than standards for reparole in effect when he was sentenced—to stay execution of Court of Appeals' judgment denying habeas corpus relief, is denied. Portley v. Grossman (REHNQUIST, J., in chambers), p. 1311.

5. *Preliminary injunction—State-court action against church.*—Application to stay District Court's order denying preliminary injunction sought by church (applicants) to preclude respondent state officials from instituting an action against applicants in state court, is denied. Synanon Foundation, Inc. v. California (REHNQUIST, J., in chambers), p. 1307.

STEELHEAD TROUT. See **Parties.**

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1. Notation of the death of Mr. Justice Douglas (retired), p. VII.
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Goods lost by Customs Service—United States' liability.—United States may be held liable in an action under Act for breach of an implied contract of bailment when goods are lost while held by Customs Service following their seizure for customs violations, notwithstanding claims arising with respect to detention of merchandise by any customs officer are excepted from Government's tort liability under Federal Tort Claims Act. Hatzlachh Supply Co. v. United States, p. 460.

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1. *"Bribery . . . in violation of the laws of the State in which committed."* Travel Act, 18 U. S. C. § 1952. Perrin v. United States, p. 37.

2. *"Civil action."* § 2, Mandamus and Venue Act of 1962, 28 U. S. C. § 1391 (e). Stafford v. Briggs, p. 527.

3. *"Default, delinquency, or similar charges."* Truth in Lending Act, 15 U. S. C. §§ 1638 (a)(9), 1639 (a)(7). Ford Motor Credit Co. v. Milhollin, p. 555.

4. *"Final decision."* 28 U. S. C. § 1291. Seatrain Shipbuilding Corp. v. Shell Oil Co., p. 572.

5. *"Maritime employment."* § 2 (3), Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 902 (3). P. C. Pfeiffer Co. v. Ford, p. 69.

6. *"Professional employee."* § 2 (12), National Labor Relations Act, 29 U. S. C. § 152 (12). NLRB v. Yeshiva University, p. 672.

7. *"Seniority . . . system."* § 703 (h), Civil Rights Act of 1964, 42 U. S. C. § 2000e–2 (h). California Brewers Assn. v. Bryant, p. 598.

8. *"Within two years after such claim accrues."* Federal Tort Claims Act, 28 U. S. C. § 2401 (b). United States v. Kubrick, p. 111.

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